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### Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report

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*This article seeks to draw attention to certain ethical misconduct of litigators that is routinely accepted, tolerated, or ignored by the legal profession. Though there are other examples, the author focuses on conduct prohibited by Federal Rule of Civil Procedure 11. In particular, the author concentrates on that rule's so-called "safe harbor" provision, which he argues serves to insulate, and possibly encourage, illegitimate advocacy in the form of the assertion and maintenance of frivolous claims, defenses, or other contentions—ironically, the very conduct that the rule was ostensibly intended to deter. Regardless of the frequency of this sort of misbehavior, the offending attorney can, as a practical matter, escape both court sanctions and professional discipline. In an effort to end the toleration of those who habitually engage in such an illegitimate fashion, the author proposes an enhancement of the ethical duty to report through the creation and maintenance of "litigation misconduct databases" that will monitor this and other unethical litigation behavior, which presently is de facto unregulated.*

#### I. INTRODUCTION

The legal profession is, by and large, self-regulating.<sup>1</sup> Beginning as early as 1836 with David Hoffman's *Fifty Resolutions in Regard to Professional*

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*Deportment*,<sup>2</sup> and continuing through to the present, widely-adopted Model Rules of Professional Conduct,<sup>3</sup> lawyers, including judges, have drafted and

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<sup>1</sup>The primary reason for permitting lawyers to regulate themselves is to maintain the independence of the profession. See RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS § 1 cmt. d (2000); MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 2 (1990). Lawyers' perceived commitment to social justice and their role as protectors of the public good, so the argument goes, would be compromised if the profession were beholden to the watchful authority of some outside regulator. See MODEL RULES OF PROF'L CONDUCT, Preamble ¶ 10 (2000), reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, 2001 SELECTED STANDARDS ON PROF'L RESPONSIBILITY 4 (2001) [hereinafter MORGAN & ROTUNDA] ("Self-regulation . . . helps maintain the legal profession's independence from government domination."). By allowing lawyers to self-regulate, it is believed that the profession will be insulated from potential government or other non-legal corrupting influences that could hinder the effective performance of their duties to society. See *id.* ("An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice."); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 812-13 (1992). Furthermore, at a more basic level, the complexities of the law warrant regulation by those trained in the law. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.1, at 20-21 (1986); see also Wilkins, *supra*, at 812 (noting the argument of bar leadership that disciplinary agencies are more effective "ethics" enforcers because of unique expertise). In other words, non-lawyers have traditionally been thought to lack the technical knowledge and insight to regulate the legal profession fairly and effectively. See FREEDMAN, *supra*, at 2 (noting that one rationale for self-regulation may be that "law practice is too esoteric and complex for nonlawyers to regulate"). But see *infra* note 4; WOLFRAM, *supra*, § 2.1, at 21 (observing that the contention that law practice issues are commonly complex and that "only lawyers can and will comprehend them is highly dubious").

There are, of course, other, less noble, but very plausible reasons for attorney self-regulation. For example, it permits lawyers to maintain a monopoly on the provision of legal services. See, e.g., Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 653-57 (1981); William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485, 493 (1995). Another possible reason may be a desire to "immunize themselves against effective external control," which is directly related to the claim that law practice is too complex for laypeople to understand. WOLFRAM, *supra*, § 2.1, at 21.

<sup>2</sup>Following Hoffman's *Fifty Resolutions*, The Honorable George Sharswood authored his *Essay on Professional Ethics* in 1854 which in turn strongly influenced the content of Alabama's Code of Professional Ethics (1887) and the American Bar Association's ("ABA") Canons of Professional Ethics (1908). See DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 111-12 (2d ed. 1995); see also GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROF'L CONDUCT § 1.9 (3d ed. 2001). The largely aspirational and vague Canons were eventually replaced by the ABA Model Code of Professional Responsibility ("Model Code") in 1969. WOLFRAM, *supra* note 1, § 2.6.3, at 56.

<sup>3</sup>The ABA adopted the Model Rules of Professional Conduct in 1983 to replace the more cumbersome Model Code. See WOLFRAM, *supra* note 1, § 2.6.4, at 62. As of the year 2001, it appears that forty-four states and the District of Columbia had either adopted or were on their way to adopting some version of the Model Rules. See MORGAN & ROTUNDA, *supra* note 1, at

administered standards that govern the so-called "ethics" of the legal profession.<sup>4</sup> Moreover, lawyers in most jurisdictions are required to report certain ethical transgressions of fellow attorneys to the appropriate disciplinary body.<sup>5</sup> This

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153–56 (Chart on Lawyer Screening); see also RONALD D. ROTUNDA, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROF'L RESPONSIBILITY* § 1-1.5.4 (2000–2001 ed.) [hereinafter ROTUNDA, *LEGAL ETHICS*]. Most of the remaining states retain versions of the Model Code, which incorporate the substance of some Model Rules. See ABA/BNA *LAWYERS' MANUAL ON PROF'L CONDUCT* 01:3–4 (2001) [hereinafter *LAWYERS' MANUAL*]. California has its own ethical code. See *id.* at 01:3; WOLFRAM, *supra* note 1, § 2.6.5, at 64.

<sup>4</sup> Although the structure of most state disciplinary systems varies, almost all states generally model their disciplinary procedures and organizational structure in a fashion consistent with the ABA Model Rules for Lawyer Disciplinary Enforcement. See HAZARD & HODES, *supra* note 2, § 1.16; *LAWYERS' MANUAL*, *supra* note 3, at 101:2004. The typical structure places "supervisory control . . . in the [ultimate] hands of the judiciary . . ." HAZARD & HODES, *supra* note 2, § 1.16, at 1-28; see also *LAWYERS' MANUAL*, *supra* note 3, at 101:2006–07. Other components of most disciplinary systems include: disciplinary counsel (essentially the prosecutors); hearing or grievance committees; and disciplinary boards. See *LAWYERS' MANUAL*, *supra* note 3, at 101:2004–07. Lawyers have traditionally been the only participants in the disciplinary process. See, e.g., *Developments in the Law: Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1599 (1994) [hereinafter *Lawyers' Responsibilities*]. Many state disciplinary boards and/or hearing committees are comprised entirely of attorneys. See *id.* at 1599–1600. The growing majority of such bodies, however, have at least some level of non-lawyer participation in the disciplinary process. See *LAWYERS' MANUAL*, *supra* note 3, at 101:2005–06 (noting that Model Rules for Lawyer Disciplinary Enforcement recommend non-lawyer membership on both hearing committees and disciplinary boards and recognizing adherence to this recommendation); WOLFRAM, *supra* note 1, § 2.5, at 46; *Lawyers' Responsibilities*, *supra*, at 1599–1600. But it appears that non-lawyers never constitute a majority of any of these boards or committees. See *LAWYERS' MANUAL*, *supra* note 3, at 101:2005–06; WOLFRAM, *supra* note 1, § 2.5, at 46; *Lawyers' Responsibilities*, *supra*, at 1599–1600. Furthermore, the selection of participants in the process is typically carried out by organizations of lawyers. See WOLFRAM, *supra* note 1, § 2.1, at 21.

In addition to such administrative bodies, lawyer conduct may also be regulated directly by the court system. Such regulation either takes the form of the state's supreme court exercising ultimate authority over the administrative disciplinary bodies or other courts imposing sanctions directly upon attorneys practicing before them (e.g., disqualification, monetary sanctions, etc.). See *LAWYERS' MANUAL*, *supra* note 3, at 101:2006; HAZARD & HODES, *supra* note 2, § 1.6; WOLFRAM, *supra* note 1, § 2.1, at 21 and § 3.4.5, at 111. An additional court-related mechanism for regulating attorney behavior is, of course, civil liability, typically in the form of malpractice suits. See HAZARD & HODES, *supra* note 2, § 104; WOLFRAM, *supra* note 1, § 2.1, at 21. For a thorough discussion of these and other processes available for regulating attorney behavior, see generally Wilkins, *supra* note 1.

<sup>5</sup> Laura Gatland, *The Himmel Effect: 'Snitch Rule' Remains Controversial but Effective, Especially in Illinois*, 83 A.B.A. J. 24, 24 (1997); see also Julie L. Hussey, Comment, *Reporting Another Attorney for Violating the Rules of Professional Conduct: The Current Status of the Law in the States Which have Adopted the Model Rules of Professional Conduct*, 23 J. LEGAL PROF. 265 (1998–1999). Model Rule 8.3 provides that:

requirement is intended to be an indispensable part of our system of self-regulation.<sup>6</sup> Specifically, because lawyers possess specialized knowledge of the law and the legal system, they are best able to recognize serious ethical violations and therefore should be not only effective drafters, but also enforcers of the profession's ethical rules.<sup>7</sup>

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(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of an approved lawyers assistance program to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege.

MODEL RULES OF PROF'L CONDUCT R. 8.3 (2000), *reprinted in* MORGAN & ROTUNDA, *supra* note 1, at 105. Approximately forty states have adopted Model Rule 8.3, either verbatim or some variation thereof. *See* Gatland, *supra*, at 24; *see also* Hussey, *supra*, at 270-71 (noting variations from state to state, including some using "should report" rather than "shall report"). At present, California and Kentucky appear to be the only jurisdictions that do not have a reporting requirement. *See* Parker D. Eastin, Note, *Should Kentucky Impose an Enforceable Duty on Lawyers to Report Other Lawyers' Professional Misconduct?*, 87 KY. L.J. 1271, 1272 (1998-99); *see also* Michael J. Burwick, Note, *You Dirty Rat!! Model Rule 8.3 and Mandatory Reporting of Attorney Misconduct*, 8 GEO. J. LEGAL ETHICS 137, 137 (1994) (noting that in some states the duty to report is mandatory, while in others it is merely discretionary). The remaining jurisdictions have reporting rules that seem to be modeled after Model Code provision DR 1-103.

It should also be noted that judges in most jurisdictions are likewise required to report ethical misconduct of lawyers to the appropriate authorities. *See* MODEL CODE OF JUDICIAL CONDUCT, Canon 3(D)(2) (1990), *reprinted in* MORGAN & ROTUNDA, *supra* note 1, at 756-57 ("A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct...that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority."). For further discussion regarding the duty to report, *see infra* Part III.

<sup>6</sup> *See* Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175, 175 (1999) (noting that duty to report is "crucial to the legal profession's ability and right to regulate itself"); *see also* Gerard E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 537 (1986) (noting that "[b]ecause lawyers are members of a self-governing, self-policing profession, one could argue that a reporting obligation would serve a special need of the bar").

<sup>7</sup> *See* WOLFRAM, *supra* note 1, § 2.1, at 21; Wilkins, *supra* note 1, at 812; *see also* N.Y. COMM. ON PROF'L RESPONSIBILITY, *THE ATTORNEY'S DUTIES TO REPORT THE MISCONDUCT OF OTHER ATTORNEYS AND TO REPORT FRAUD ON A TRIBUNAL*, *reprinted in* 47 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 905, 906 (1992) [hereinafter NYC PROF'L RESPONSIBILITY REPORT] (noting that "reporting requirements are a particularly useful

Nevertheless, attorneys routinely ignore, or at least fail to fulfill, the ethical obligation to report the misconduct of other lawyers.<sup>8</sup> There are various explanations for this troubling reality,<sup>9</sup> but the root of the problem appears to be a

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instrument for maintaining ethical standards in the practice of law because they utilize the knowledge of the persons most likely to discover first when those ethical standards are breached”).

<sup>8</sup> See DEBORAH L. RHODE, *PROF'L RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* 70 (2d ed. 1998) (noting that bar disciplinary systems “rely almost exclusively on client grievances . . . as sources of information about attorney misconduct”); WOLFRAM, *supra* note 1, § 12.10.1, at 683 (noting that “[p]robably no other professional requirement is as widely ignored by lawyers subject to it” as the duty to report); Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel*, 1988 U. ILL. L. REV. 977, 979 (1988) (noting the disinclination of lawyers to report fellow members of the bar to disciplinary authorities); Wilkins, *supra* note 1, at 822–23 (noting that the vast majority of disciplinary complaints are filed by clients rather than lawyers or judges); Burwick, *supra* note 5, at 143 (stating that the legal profession has viewed Model Rule 8.3 “as a Pandora’s box which attorneys have been reluctant to open”); Hussey, *supra* note 5, at 265 (observing that “[m]ost attorneys will agree with this rule on the surface, simultaneously knowing that they would never report a colleague”).

<sup>9</sup> See generally Lynch, *supra* note 6. Probably the most obvious and simplistic reason why lawyers fail to report the misconduct of fellow attorneys is that no one wants to be a “snitch.” See *id.* at 518–22 (observing the general societal bias against those who “inform” with regard to the wrongdoing of others); Richmond, *supra* note 6, at 176 (noting “general professional ambivalence toward those who report others’ wrongdoing to appropriate authorities”). A more sophisticated explanation may stem from a concern with regard to whether or not perceived misconduct actually rises to the level of a reportable ethical violation, or whether one possesses sufficient “knowledge” to conclude that such an ethical violation in fact occurred. See, e.g., RHODE, *supra* note 8, at 70 (noting that “[w]hat constitutes an incompetent performance or an unreasonable fee is often difficult to assess except at the extremes”); WOLFRAM, *supra* note 1, § 12.10.1, at 684 (observing that Model Rule 8.3 is “unfortunately vague and indefinite”); Lynch, *supra* note 6, at 506–15 (noting the difficulties associated with the recognition of an ethical violation and the determination of the existence of the requisite knowledge thereof); Richmond, *supra* note 6, at 185 (noting problems created by the failure of Model Rule 8.3(a) to define what constitutes “knowledge”); Burwick, *supra* note 5, at 143 (observing that “Pandora’s box” potential of Model Rule 8.3 is one explanation for its rare invocation). This form of reticence is likely the result of the worry that one day “the shoe could be on the other foot.” See RHODE, *supra* note 8, at 70 (noting that “[m]any lawyers do not feel sufficiently blameless to cast the first stone unless they are sure of a fellow practitioner’s serious misconduct”); Wilkins, *supra* note 1, at 822–23 (observing that reporting disincentive may stem from a desire to avoid the risk of “inviting a retaliatory response”). Another very practical reason for failure to report may simply be a desire to avoid the perceived hassle associated with filing a formal disciplinary complaint. Furthermore, the perception that a reported violation is likely to go unpunished “has been a major rationale and rationalization for non-reporting.” RHODE, *supra* note 8, at 70. Finally, many lawyers are either unfamiliar with the obligation to report, or else do not take this ethical requirement seriously, given that it is largely unenforceable. See, e.g., NYC PROF'L RESPONSIBILITY REPORT, *supra* note 7, at 907 (noting possibility that reporting requirements may not be taken seriously by lawyers and disciplinary bodies). But see *In re Himmel*, 533 N.E.2d 790 (Ill. 1988) (suspending lawyer for one year for

general acceptance or tolerance of attorney misbehavior, particularly in the litigation context.<sup>10</sup> Indeed, much of the conduct that lawyers, as well as judges, detest and complain about the most is behavior that they habitually rationalize as part of the adversary process.<sup>11</sup> The adversary system itself creates an environment in which certain objectively unacceptable practices are protected, tolerated, or ignored, notwithstanding their illegitimate nature.<sup>12</sup> This article will

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failure to report another attorney to disciplinary authorities); *see also* Rotunda, *supra* note 8. For further elaboration on the reasons why lawyers tend not to report other members of the bar, *see infra* Part III.

<sup>10</sup> Cf. Warren E. Burger, *The Decline of Professionalism*, 63 *FORDHAM L. REV.* 949, 953 (1995) (noting that "[w]hen even a few judges tolerate the Rambo Lawyer's misconduct, the administration of justice suffers, and it leads to repetition of that conduct by other lawyers"); Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 *LOY. L.A. L. REV.* 81, 83 (1991) (arguing that "judicial tolerance of the intolerable is a substantial factor which lies at the root of the Rambo litigation phenomenon"); *infra* notes 11-12, 113.

<sup>11</sup> *See, e.g.*, Kanner, *supra* note 10, at 91 (observing that in California certain "courtroom improprieties are tolerated by the bench not because . . . courts favor misconduct, but because they rationalize away the immorality of their approach for the sake of preferred outcomes and case dispositions"); *see also supra* note 10; *infra* notes 12, 113. The acceptance by practicing lawyers of such litigation misconduct is likely attributable, at least in part, to the perception (and apparent reality) that judges themselves are tolerant of this sort of misbehavior. *See infra* note 113; *see also infra* note 231.

In addition, Judge William W. Schwarzer has aptly noted the danger associated with such tolerance in the context of Rule 11 violations: "Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense." William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 *F.R.D.* 181, 205 (1985) [hereinafter Schwarzer, *Sanctions*]. Judge Schwarzer also wisely observed that "vigorous advocacy is not contingent on lawyers being free to pursue litigation tactics that they cannot justify as legitimate." *Id.* at 184.

<sup>12</sup> Chief Justice Warren E. Burger made a similar observation in 1976, when he noted the existence, "[c]orrect or not," of a "widespread feeling that the legal profession and judges are overly tolerant to lawyers who exploit the inherently contentious aspects of the adversary system to their own private advantage at public expense." Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, Keynote Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 7-9, 1976), *reprinted in* 70 *F.R.D.* 83, 91 (1976). This "widespread feeling" observed by Chief Justice Burger was likely an accurate perception of the "overly tolerant" acceptance of what might be termed "hyper-advocacy" in 1976, and the situation has almost certainly worsened since that time. *See* Judith L. Maute, *Sporting Theory of Justice: Taming Adversary Zeal with a Logical Sanctions Doctrine*, 20 *CONN. L. REV.* 7, 50 (1987) (noting that "[i]n an adversary culture where some forms of cheating are unwritten rules of the game, even observed violations are often greeted with fraternal tolerance by opposing counsel and trial judges"); *see also infra* note 231. Indeed, as this article will discuss, the profession's current tolerance of attorney misconduct is, under certain circumstances, actually encouraged, or at least facilitated, by the litigation process and the rules that govern it. *See infra* Part II. *See generally* Kanner, *supra* note 10.

Professor Monroe Freedman has expressed a contrary view, noting that:

focus upon one area of litigation abuse that has been granted protection or legitimacy by the very rule that was ostensibly promulgated to curtail it—the maintenance of frivolous or abusive filings in the face of Federal Rule of Civil Procedure 11 (“Rule 11”).<sup>13</sup>

Under amended Rule 11, a “pleading, written motion, or other paper” that is filed for an improper purpose, or lacks an appropriate legal or factual foundation, supposedly subjects the attorney responsible for such a filing to sanctions.<sup>14</sup> “Supposedly” because the current rule contains a safe harbor provision that allows the illegitimate advocate an opportunity to avoid sanctions, despite having committed a violation, by withdrawing or correcting the offensive paper within twenty-one days of *service* of a motion thereunder.<sup>15</sup>

Rule 11’s safe harbor provision not only permits a recalcitrant attorney to elude sanctions from the trial court, it also insulates him or her from any form of parallel professional discipline. The prevailing view, albeit incorrect, seems to be that the misconduct, tolerated and protected by Rule 11, is not the sort of unethical behavior that should trigger an attorney’s duty to report.<sup>16</sup> As a result, the very mechanism intended from its inception to deter frivolous filings in federal court now serves as a safety net for illegitimate advocates who wish to abuse the system.

This illogical procedure, whereby an aspect of the adversary system serves as a shield for the unworthy, is by no means limited to the Rule 11 context.<sup>17</sup> This

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Judges have been abusing their powers to sanction lawyers, and, at a lower level of public visibility, they have been making indiscriminate threats against lawyers in the course of litigation. As a result, lawyers are being chilled in fulfilling their responsibilities to their clients, and the adversary system is indeed being significantly impaired.

FREEDMAN, *supra* note 1, at 82.

<sup>13</sup> There is no doubt that frivolous filings also occur in state courts, and the points that will be raised in this article should certainly be considered in the context of those courts as well. All states have rule-based or statutory counterparts to Rule 11 that are very similar in purpose, content, and/or operation. See LAWYERS’ MANUAL, *supra* note 3, at 61:178–79; Byron C. Keeling, *Toward a Balanced Approach to “Frivolous” Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1073 & n.25 (1994). The reason for limiting the scope of this article’s analysis to Rule 11 is merely to present the issues and arguments in a more uniform and coherent fashion.

<sup>14</sup> See FED. R. CIV. P. 11. For the full text of the rule, see *infra* note 50.

<sup>15</sup> See FED. R. CIV. P. 11(c)(1)(A) (emphasis added).

<sup>16</sup> See *infra* notes 238–39 and accompanying text. As will be discussed in section C of Part III, it is my position that such misconduct is definitely the type of unethical behavior that should be reported, particularly when it occurs on more than one occasion.

<sup>17</sup> There are likewise other “unethical,” or at least “questionable” litigation practices besides frivolous filings in which attorneys engage that are similarly protected, tolerated, or ignored by the system. Cf. Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 959 (1998) (arguing that changes in the Federal Rules of Civil Procedure have contributed to the “perceived decline in ethical stature and social utility of the legal profession” by facilitating partisan behavior through diminution in

article utilizes the example of Rule 11 because it provides a familiar vehicle for examination of the general problem, and a prototypical solution, which is the creation of a more efficient and accessible "duty to report" through the implementation of "litigation misconduct databases."

Part II of this article will explore the history of the disciplinary component of Rule 11 and how the current version of the rule departs from this tradition by providing sanctuary for offending attorneys<sup>18</sup> who should be subject to some form of professional discipline. Part III will discuss how the inefficacy of the ethical duty to report attorney misconduct (as embodied in Model Rule of Professional Conduct 8.3) exacerbates the problem by further insulating such improper behavior. This article will conclude in Part IV with a detailed proposal calling for a change to the current mechanism for reporting attorney misconduct through the institution of "litigation misconduct databases," maintained by disciplinary authorities to monitor illegitimate advocacy and to identify and sanction those attorneys who habitually abuse the litigation process.

## II. FEDERAL RULE OF CIVIL PROCEDURE 11

### A. *The Evolution of Rule 11*

The original 1938 version of Rule 11<sup>19</sup> evidenced a clear intent on the part of the drafters to deter frivolous<sup>20</sup> or abusive litigation in federal court, at least in

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the "importance of judicial application of law to fact"). This article focuses solely on Rule 11 as a means of highlighting by example the ethical concerns created in the litigation context when the judicial system appears to foster tolerance or acceptance of certain forms of misconduct. The ethical issues and concerns addressed in this article, and the ultimate solution proposed, for example, are equally applicable to such problems as discovery abuse and discriminatory use of peremptory challenges. Consequently, the article should be considered in a fashion broader than its subject matter limitation might otherwise suggest. For a thorough and thoughtful examination of ethical concerns in the context of civil discovery, see John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505 (2000).

<sup>18</sup> Rule 11 applies to parties to litigation also, but because this article is only concerned with the behavior of lawyers, it will focus solely on Rule 11's application to and effect on attorneys.

<sup>19</sup> In 1938, Rule 11 provided that:

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of the rule, it may be stricken as sham and false and the action may proceed as though the pleading had not



part, by way of disciplinary action.<sup>21</sup> The text of the rule provided that: "For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action."<sup>22</sup> A similar remedy was likewise available if "scandalous or

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been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

FED. R. CIV. P. 11 (1938). Because I will be referring to three separate versions of Rule 11, for clarity, I will identify the two earlier versions of the rule by placing their effective dates in parenthesis following each citation thereto.

<sup>20</sup> There are innumerable variations on what constitutes a "frivolous" claim or action, which in the end appear to amount to little more than an "I know it when I see it" standard. See HAZARD & HODES, *supra* note 2, § 27.12, at 27-25 (alluding to Justice Potter Stewart's famous quote regarding the recognition of what constitutes pornography); see also Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All*, 24 OSGOOD HALL L.J. 353, 370 (1986). The traditional definition of "frivolous" is "obviously false upon the face of a pleading, as when something was pleaded that conflicted with a judicially noticeable fact or was logically impossible . . ." D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 18 (1976-1977). In addition, the United States Supreme Court has defined a "frivolous" complaint in the context of 28 U.S.C. § 1915(d) as one that "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); see also *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985) (holding that, for purposes of Rule 11, a claim is frivolous when "it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands"); RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS § 110 cmt. d (2000) ("A frivolous position is one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it."); Nathan M. Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 WAKE FOREST L. REV. 671, 682 (1997) (suggesting that "the appropriate definition of a frivolous legal contention is one that objectively has less than a de minimis chance of success, with de minimis being defined as five percent"); Carl Tobias, *The 1993 Revision to Federal Rule 11*, 70 IND. L.J. 171, 197-201 (1994) (noting how various courts have defined "frivolous" under Rule 11 and in similar contexts) [hereinafter Tobias, 1993 Revision]. See generally Samuel J. Levine, *Seeking a Common Language for the Application of Rule 11 Sanctions: What is "Frivolous"?*, 78 NEB. L. REV. 677 (1999); Levinson, *supra*. But see Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65 (1996) (essentially arguing that there is no such thing as a frivolous case). For further elaboration of Professor Yablon's position, see *infra* note 81.

<sup>21</sup> It is also important to note that the drafters of the 1938 version appear to have been much more concerned with preventing attorneys from *intentionally* abusing the litigation process, rather than deterring the assertion of positions that were objectively without legal or factual merit. See Keeling, *supra* note 13, at 1075. This suggests a desire to focus on conduct that is truly abusive. Ironically, as discussed later, the 1993 version, operating in isolation from the ethical rules, appears to insulate rather than punish such wrongdoers insofar as they can shelter themselves from Rule 11 sanctions by taking advantage of the rule's "safe harbor" provision. See *infra* Part II. B.

<sup>22</sup> FED. R. CIV. P. 11 (1938) (emphasis added). For violations that were not willful, the appropriate sanction was apparently to strike the offending pleading. See *id.* Courts, however,

indecent" matters were contained in a signed pleading.<sup>23</sup> "Appropriate disciplinary action" could have included a "[p]unitive fine or imprisonment through the contempt power, formal reprimand by the court, or even disbarment . . ."<sup>24</sup> It seems apparent that, unlike the other Federal Rules of Civil Procedure, Rule 11 was not simply intended as another tool for "secur[ing] the just, speedy, and inexpensive determination of every action."<sup>25</sup> The original language of Rule 11 clearly suggested an intention to provide an alternative mechanism for regulating attorney conduct<sup>26</sup> besides the "regulation" that was then ostensibly offered by the Canons of Professional Ethics,<sup>27</sup> adopted by most

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rarely resorted to this sanction. See Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 191 (1988) [hereinafter Vairo, *Critical Analysis*].

<sup>23</sup> FED. R. CIV. P. 11 (1938); see also Risinger, *supra* note 20, at 14.

<sup>24</sup> Risinger, *supra* note 20, at 43. But see Jeffrey A. Parness, *Disciplinary Referrals Under New Federal Civil Rule 11*, 61 TENN. L. REV. 37, 40 (1993) (observing that the 1938 version of Rule 11 "failed to elaborate on or illustrate what might constitute 'appropriate disciplinary action'" [hereinafter Parness, *Disciplinary Referrals*]).

<sup>25</sup> FED. R. CIV. P. 1; see also FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 1 (3d ed. 1999) ("[T]he purpose underlying the establishment of most rules of civil procedure, in any judicial system, is to promote the just, efficient, and economical resolution of civil disputes.").

<sup>26</sup> See *supra* note 19; cf. George Cochran, *Rule 11: The Road to Amendment*, 61 MISS. L.J. 5, 16 (1991) (noting that the 1983 version of Rule 11 "generates disciplinary power within the federal court system which has heretofore been the sole dominion of state licensing bodies"). It is also significant to note that commentators have observed that later versions of Rule 11 likewise maintained, or possibly increased, this emphasis on the regulation of attorney behavior. See Lawrence M. Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 VILL. L. REV. 575, 578-79 (1987); Victor H. Kramer, *Viewing Rule 11 As a Tool to Improve Professional Responsibility*, 75 MINN. L. REV. 793, 798 (1991); Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 BYU L. REV. 959, 972-73 (1991); Stephen R. Ripps & John N. Drowatzky, *Federal Rule 11: Are the Federal District Courts Usurping the Disciplinary Function of the Bar?*, 32 VAL. U. L. REV. 67 (1997); William W. Schwarzer, *Rule 11: Entering a New Era*, 28 LOY. L.A. L. REV. 7, 7 (1994) [hereinafter Schwarzer, *New Era*]; Georgene M. Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 599 (1998) [hereinafter Vairo, *Rule 11*]; see also *infra* note 131 and accompanying text.

<sup>27</sup> For the bulk of the period during which the 1938 version of Rule 11 was in effect, so-called "lawyer ethics" was informed and, to a certain extent, governed by a broad set of largely aspirational edicts promulgated by the ABA, known as the Canons of Professional Ethics. See WOLFRAM, *supra* note 1, § 2.6.1, at 50, 53-56. The importance of the Canons with respect to the actual regulation of attorney conduct was certainly suspect, given their somewhat unrealistic moral benchmarks. See *id.* (noting that "the Canons were widely ignored or superfluous for many regulatory purposes"). Furthermore, it is widely accepted that one of the primary motivations underlying the enactment of the Canons was to impede the practice of law by certain individuals—specifically, those who were not "native-born, white, Anglo-Saxon Protestant[s]." FREEDMAN, *supra* note 1, at 3; see also JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 106-08 (1976) (noting distress among the organized bar with "the influx of foreigners" to the profession during the early 1900s). The Canons evidenced an obvious class and ethnic bias insofar as many of them condemned common practices employed by ethnic minorities (e.g., contingency fees). *Id.* at

state disciplinary bodies at that time.<sup>28</sup> Nevertheless, it is possible that the drafters simply intended the disciplinary sanctions to be a meaningful method for courts to deter abuse and thus better manage and streamline the litigation process.<sup>29</sup> Whatever the rationale, it cannot be disputed that attorney discipline was an original component of Rule 11.<sup>30</sup>

Despite being equipped with the tools to deal sternly and effectively with litigation abuse, the bench and bar almost never invoked the 1938 version of Rule 11.<sup>31</sup> The reasons for this lack of use range from the difficulty in proving a violation,<sup>32</sup> to the wholly discretionary nature of the sanctions, to the innate

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44–53. The enactment of the Canons represented but one step, among various others, designed to protect the “sanctity” of the legal profession. *See generally id.* at 106–29. In light of the Canons’ tainted pedigree, it is arguable that Rule 11 actually provided a better, or at least more legitimate, vehicle for regulating attorney conduct during this time period.

<sup>28</sup> *See* RHODE, *supra* note 8, at 44; WOLFRAM, *supra* note 1, § 2.6.2, at 55–56.

<sup>29</sup> *See* FED. R. CIV. P. 1; *see also* T. E. WILLING, FEDERAL JUDICIAL CENTER, THE RULE 11 SANCTIONING PROCESS 21 (1988) (noting that “[a]n overarching view of Rule 11 sanctions is that they are part of a package of case management tools that are designed to enable judges to separate cases that warrant full judicial attention from those that are frivolous or meritless”).

<sup>30</sup> The apparent discipline contemplated under the 1938 version seems to have been confined to the federal forum. For example, a federal district court could have suspended or disbarred an offending attorney from practicing before that specific court. *See* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 269 (2d ed. 1994); Jeffrey A. Parness, *Fines Under New Federal Civil Rule 11: The New Monetary Sanctions for the “Stop-and-Think Again” Rule*, 1993 BYU L. REV. 879, 906 (1993) [hereinafter Parness, *Fines*]. A state body could choose to suspend or disbar the lawyer as well, based upon the federal court’s decision, but it could not be required to do so. *See, e.g.,* McMorrow, *supra* note 26, at 965. Nevertheless, it would certainly have been appropriate for a federal court to file a complaint with or make a referral to an appropriate state disciplinary authority following that court’s finding of a Rule 11 violation. *See, e.g.,* MODEL CODE OF JUDICIAL CONDUCT, Canon (3)(D)(2) (1990), *reprinted in* MORGAN & ROTUNDA, *supra* note 1, at 756–57; *cf.* JOSEPH, *supra*, at 269 (noting that such sanctions as suspension or disbarment may trigger the procedural need to make a referral to the appropriate federal court disciplinary committee). Indeed, this is precisely what courts should do, even under the 1993 version of Rule 11. *See* Kramer, *supra* note 26, at 808–09. *But see* Cochran, *supra* note 26, at 16 (noting failure of courts to refer Rule 11 violations to disciplinary bodies). *See generally* Parness, *Disciplinary Referrals*, *supra* note 24; Ripps & Drowatzky, *supra* note 26.

<sup>31</sup> *See* FED. R. CIV. P. 11 advisory committee’s note to 1983 amendments; Risinger, *supra* note 20, at 34–35; Schwarzer, *New Era*, *supra* note 26, at 8; Schwarzer, *Sanctions*, *supra* note 11, at 183; Vairo, *Critical Analysis*, *supra* note 22, at 191; Vairo, *Rule 11*, *supra* note 26, at 596.

<sup>32</sup> Under the 1938 version of Rule 11, it was generally understood that one had to establish that the alleged recalcitrant attorney exhibited subjective bad faith, i.e., that he or she knowingly pursued a claim or position lacking “good ground to support it.” FED. R. CIV. P. 11 (1938); *see also* Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985) (noting that the 1938 version of Rule 11 “contemplated sanctions only where there was a showing of bad faith”); Keeling, *supra* note 13, at 1075; Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 947 (1992); William I. Weston, *Court-Ordered Sanctions of*

reluctance throughout the profession to pursue sanctions against fellow members of the bar.<sup>33</sup>

As a result of the chronic failure of lawyers and judges to use Rule 11, and to thereby achieve its goal of deterring frivolous litigation, the rule was amended in 1983.<sup>34</sup> Most notably, the revisions<sup>35</sup> changed the subjective bad faith standard for

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*Attorneys: A Concept that Duplicates the Role of Attorney Disciplinary Procedures*, 94 DICK. L. REV. 897, 904 n.35 (1990). See generally Risinger, *supra* note 20, at 52–61. Even though this subjective standard appeared to be the appropriate measure for judging misconduct under the rule, commentators nevertheless noted confusion surrounding the applicable standard of conduct, which also contributed to the widespread reluctance to invoke Rule 11. See SAUL M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 3 (1985); Edward D. Cavanagh, *Rule 11 of the Federal Rules of Civil Procedure: The Case Against Turning Back the Clock*, 162 F.R.D. 383, 387 (1995); Vairo, *Critical Analysis*, *supra* note 22, at 191.

<sup>33</sup> See KASSIN, *supra* note 32, at 4 (recognizing general reluctance of judges to impose sanctions); Cavanagh, *supra* note 32, at 388 (noting courts' hesitancy to "dress-down members of the bar"); Risinger, *supra* note 20, at 47 (noting that "American lawyers and American courts have always been less than aggressive in using their powers to fasten liability onto other lawyers"); Schwarzer, *New Era*, *supra* note 26, at 8 (observing general judicial disinclination to impose sanctions); Schwarzer, *Sanctions*, *supra* note 11, at 183 (noting that "lawyers are generally reluctant to seek sanctions and judges to impose them"); Vairo, *Critical Analysis*, *supra* note 22, at 191 (noting reluctance of attorneys to use Rule 11 against one another). This reluctance with regard to pursuing sanctions under the 1938 version of Rule 11 is obviously parallel to lawyers' longstanding reluctance to report ethical misconduct; see *supra* notes 8–9 and accompanying text. See also *infra* Part III.

<sup>34</sup> See FED. R. CIV. P. 11 advisory committee's note to 1983 amendments ("The new language is intended to reduce the reluctance of courts to impose sanctions . . . by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions.").

<sup>35</sup> The 1983 version of Rule 11 provided as follows:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

determining a violation to one of objective reasonableness<sup>36</sup> and made the imposition of sanctions mandatory, hence eliminating any element of judicial discretion in this regard.<sup>37</sup> Lawyers were thus more apt to resort to Rule 11 given that a violation was easier to prove, and, if proved, a sanction was certain.<sup>38</sup>

Unfortunately, the 1983 amendments did more than create an effective tool for fending off frivolous claims and positions; they converted Rule 11 into an offensive litigation weapon, used and abused far too frequently.<sup>39</sup> Empirical studies of the impact of Rule 11 following the 1983 changes invariably reveal that the revisions spawned a veritable explosion of satellite litigation.<sup>40</sup> Between 1983

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FED. R. CIV. P. 11 (1983).

<sup>36</sup>The standard to be applied under the 1983 version was objective in nature; however, there was apparently some initial confusion in this regard. See Vairo, *Critical Analysis*, *supra* note 22, at 205–07. Although it seems that all circuits had adopted an objective test by the late eighties, to the extent that any doubt remained, the issue seems to have been definitively settled by the Supreme Court in two cases: *Cooter & Gell v. Hartmarx Corp.* 496 U.S. 384, 392–93 (1990), which discusses the change in the 1983 version of Rule 11 to an objective standard of “reasonable inquiry,” and *Bus. Guides, Inc. v. Chromatic Communications Enterprises*, 498 U.S. 533, (1991), which held that Rule 11 “imposes an objective standard of reasonable inquiry on represented parties who sign papers and pleadings[,]” as well as on their counsel. *Id.* at 554; see also Cavanagh, *supra* note 32, at 388–89.

<sup>37</sup>The only discretion that courts possessed under the revised rule was with regard to the determination of the nature of the sanction to be imposed, as well as deciding upon whom the sanction should be imposed. See FED. R. CIV. P. 11 advisory committee’s note to 1983 amendments (“[The court] has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.”); see also Vairo, *Critical Analysis*, *supra* note 22, at 194.

<sup>38</sup>See FED. R. CIV. P. 11 advisory committee’s note to 1983 amendments (“The text of the . . . rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked.”); Vairo, *Critical Analysis*, *supra* note 22, at 193.

<sup>39</sup>See Cochran, *supra* note 26, at 14 (observing that some viewed Rule 11 “as a weapon of ‘warfare,’ to be employed as part of ‘hard ball’ litigation techniques”); Mark S. Stein, *Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments*, 132 F.R.D. 309, 309 (noting the presence of incentives in litigation “to threaten or seek sanctions against legal arguments that are not frivolous, but dangerous”); Carl Tobias, *Why Congress Should Reject Revision to Rule 11*, 160 F.R.D. 275, 276–77 (1995) (noting the tactical use of Rule 11 “such as [to] threaten[ ] less powerful parties”) [hereinafter Tobias, *Why Congress*]; Vairo, *Critical Analysis*, *supra* note 22, at 195–96 (noting that lawyers routinely abused Rule 11 to force adversaries to justify their positions and as a discovery device); Weston, *supra* note 32, at 899 (observing that attorney sanctions are used as a weapon insofar as “[l]awyers threaten one another to force or prevent specific conduct”); Wilkins, *supra* note 1, at 838 (noting that Rule 11 provides adversaries with the opportunity to “gain a number of strategic advantages from reporting lawyer misconduct”).

<sup>40</sup>See Cochran, *supra* note 26, at 15; Grosberg, *supra* note 26, at 647–49; Keeling, *supra* note 13, at 1080–81; William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1017–18 (1988) [hereinafter Schwarzer, *Revisited*]; Tobias, *1993 Revision*, *supra* note 20, at 172; Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV.

and June 1993, approximately 7,000 judicial opinions referencing Rule 11 were reported,<sup>41</sup> as compared to the less than twenty-five that were published under the 1938 version.<sup>42</sup> Furthermore, there is ample evidence to suggest that plaintiffs, and civil rights plaintiffs in particular, were far more likely than defendants to be the targets of Rule 11 motions and the recipients of sanctions.<sup>43</sup> The resultant

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1775, 1776 (1992) [hereinafter Tobias, *Civil Rights Plaintiffs*]; Carl Tobias, *Reconsidering Rule 11*, 46 MIAMI L. REV. 855, 860 (1992) [hereinafter Tobias, *Reconsidering*]; Vairo, *Critical Analysis*, *supra* note 22, at 199; Vairo, *Rule 11*, *supra* note 26, at 598–99; *Lawyers' Responsibilities*, *supra* note 4, at 1638–39. *See generally* WILLGING, *supra* note 29, at 107–23. One notable commentator has defined "satellite litigation" as "ancillary proceedings that may otherwise assume the dimensions of litigation with a life of its own." Schwarzer, *Sanctions*, *supra* note 11, at 183.

<sup>41</sup> *See* Vairo, *Rule 11*, *supra* note 26, at 626. These large numbers are likely but the "tip of the iceberg," as the vast majority of decisions concerning Rule 11 are not published. *See* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1955–56 (1989).

<sup>42</sup> *See, e.g.*, Keeling, *supra* note 13, at 1075; Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules*, 32 CONN. L. REV. 155, 157 (1999); Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices*, 60 FORDHAM L. REV. 257, 257 (1991).

<sup>43</sup> *See, e.g.*, STEPHEN B. BURBANK, AMERICAN JUDICATURE SOCIETY, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11* 65 (1989) [hereinafter *RULE 11 IN TRANSITION*]; KASSIN, *supra* note 32, at 38; ELIZABETH WIGGINS ET AL., FEDERAL JUDICIAL CENTER, *RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES*, § 1B (1991) [hereinafter *FJC FINAL REPORT*]; Burbank, *supra* note 41, at 1937–38; Marshall et al., *supra* note 32, at 952–53; Melissa L. Nelken, *Sanctions Under Amended Rule 11—Some Chilling Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1327, 1340 (1986) [hereinafter Nelken, *Sanctions*]; Attachment B to Letter from Hon. Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules to Hon. Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure 3 (May 1, 1992), reprinted in 146 F.R.D. 519, 523 (1993) [hereinafter *Pointer Letter*, Attachment B]; Morton Stavis, *Rule 11: Which is Worse—The Problem or the Cure?*, 5 GEO. J. LEGAL ETHICS 597, 606–08 (1992); Tobias, *Civil Rights Plaintiffs*, *supra* note 40, at 1776–77; Vairo, *Critical Analysis*, *supra* note 22, at 200–01. *But see* Spiegel, *supra* note 42, at 176–77 (acknowledging criticism that possible over-inclusiveness of the definition of "civil rights" cases may have resulted in a misperception or exaggeration of the true impact on "traditional" civil rights cases); Tobias, *1993 Revision*, *supra* note 20, at 181 (noting that the advisory committee's April 1992 interim report on the proposed 1993 amendments "found insufficient evidence that the [1983 version] . . . had a chilling effect on civil rights litigants"); Tobias, *Reconsidering*, *supra* note 40, at 860 (noting a decline in 1988 and thereafter with regard to Rule 11 sanctions against civil rights plaintiffs). *See generally* Spiegel, *supra* note 42, at 168–80; Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 483–86 (1991) [hereinafter Vairo, *Where We Are*]. It should also be noted that some commentators have offered as an explanation or justification for the disparate impact of Rule 11 sanctions on civil rights plaintiffs that such "cases are more likely to be frivolous than others." Spiegel, *supra* note 42, at 191–92 (discussing comments made by Judge William O. Bertlesman during 1991 public

effect was a widely held view that Rule 11 was "chilling" legitimate creative advocacy.<sup>44</sup> Moreover, commentators and critics observed various other serious problems under the 1983 version, including the following: (1) courts rarely imposed non-monetary sanctions for violations; (2) there was no incentive for parties to abandon claims or contentions discovered to be lacking a legal or factual basis; (3) counsel were more antagonistic towards one another; and (4) relations between attorney and client were, at times, strained.<sup>45</sup>

Thus, the 1983 solution to the problems associated with the 1938 edition of Rule 11 actually made matters worse in many respects. While the 1938 version allowed most litigation misconduct to slip through the cracks, the 1983 Rule 11 arguably went too far in the opposite direction. In fact, although the latter version may have reduced the incidences of frivolous filings, it also permitted lawyers to engage in another type of litigation abuse alluded to earlier—the offensive use of Rule 11 as a litigation weapon.<sup>46</sup> Indeed, this form of illegitimate advocacy could potentially do more harm to the legal process than the filing of frivolous pleadings.<sup>47</sup> Further change was accordingly deemed necessary.<sup>48</sup>

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hearing regarding amending the 1983 version of Rule 11 and explanations contained in the FJC Final Report).

<sup>44</sup> See Marshall et al., *supra* note 32, at 961 (observing that 19.3% of respondents to Rule 11 survey reported that within the past year—prior to 1992—they had declined to present a claim or defense despite believing said claim or defense to have merit); see also Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 393–94 (1990) [hereinafter Nelken, *Looking for Middle Ground*]; Nelken, *Sanctions*, *supra* note 43, at 1343–44; Stavis, *supra* note 43, at 607–08; Tobias, *Civil Rights Plaintiffs*, *supra* note 40, at 1777; Vairo, *Where We Are*, *supra* note 43, at 483–86. For a general empirical discussion regarding the perceived chilling effect of the 1983 version of Rule 11, see WILLGING, *supra* note 29, at 157–68. But see RULE 11 IN TRANSITION, *supra* note 43, at 69 (expressing doubt regarding the need for concern in connection with the so-called "chilling" effect of Rule 11 in the Third Circuit); FJC FINAL REPORT, *supra* note 43, § 2A, at 8 (noting that 95% of the judges surveyed did not believe that the 1983 version of Rule 11 impeded the development of the law); Schwarzer, *New Era*, *supra* note 26, at 36 (discussing lack of clarity regarding the "chilling argument"); Schwarzer, *supra* note 40, at 1017 (expressing doubt as to the reality of Rule 11 actually chilling advocacy).

<sup>45</sup> See FJC FINAL REPORT, *supra* note 43, § 1A, at 2; see also Nelken, *Sanctions*, *supra* note 43, at 1343–44 (noting that a lawyer's self interest in avoiding sanctions "may lead to an overly conservative view of the merits of a client's case"); Pointer Letter, Attachment B, *supra* note 43, at 3, reprinted in 146 F.R.D. at 523; Stein, *supra* note 39, at 330 (observing that Rule 11 is a "form of escalation, a cutthroat tactic in the struggle over the merits"); Vairo, *Rule 11*, *supra* note 26, at 590, 627, 628 (noting that the 1983 version of Rule 11 seemed to increase contentiousness and hostility between counsel).

<sup>46</sup> See *supra* note 39.

<sup>47</sup> See *supra* notes 42–43 and accompanying text.

<sup>48</sup> Despite the decision to amend Rule 11, it is significant to note that a survey of judges revealed that 80% of them considered the overall effect of the 1983 version of the rule to have been positive, notwithstanding the negative observations noted above. See FJC FINAL REPORT, *supra* note 43, § 2A, at 18. It should also be noted that it was the perception of a large majority

After a rather lengthy pre-enactment debate,<sup>49</sup> the current version of Rule 11 took effect on December 1, 1993.<sup>50</sup> Unlike its previous incarnation, this Rule 11

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of the judges surveyed that groundless litigation was not a very big problem. *See id.*, § 2A, at 2. This finding, however, does not necessarily support the argument that groundless litigation is not prevalent. It simply suggests that many of the judges polled do not deem such litigation to be a major concern, which could be read to mean that these judges consider it tolerable. Another explanation could be that groundless positions that were being taken in litigation were rarely brought to the attention of the trial judge. Although a large percentage of the judges estimated that not "many" groundless papers were filed in their courts over a twelve month span, the approximations made do not appear to have been well-grounded empirically. *See id.* § 2A, at 3.

<sup>49</sup>The Advisory Committee on Civil Rules received various requests for amendment of the 1983 version of Rule 11. In addition, assorted studies regarding the effects (mostly negative) of the 1983 version had been conducted. *See* Pointer Letter, Attachment B, *supra* note 43, at 2, reprinted in 146 F.R.D. at 522. Based on the tide of criticism and the apparent desire amongst the bar to make some change to Rule 11, the Committee solicited comments about different aspects of the rule and enlisted the Federal Judicial Center to conduct studies and surveys of its own. *See id.* A public meeting was subsequently held, at which the Committee heard from various authorities on Rule 11. *Id.* Varying views were expressed regarding whether and how Rule 11 should be altered, but the Committee ultimately determined that, "though frequently exaggerated or premised on faulty assumptions," much of the criticism of Rule 11 had some merit. *Id.* at 3. As a result, the Committee drafted a proposed amendment that it published in August of 1991. *See id.* The Committee then received substantial public comment regarding the proposed amendment, and in the end, unanimously recommended adoption of the changes as originally constituted, with a few technical alterations. *See id.* The Supreme Court approved the amendment over the stinging dissent of Justices Scalia and Thomas. *See* Supreme Court of the United States, Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 501-13 (1993).

<sup>50</sup>The 1993 version of Rule 11 reads as follows:

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;



(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On the Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanctions; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

made the "presentation" of an offending paper to the court, rather than the mere signing thereof,<sup>51</sup> the triggering event for a violation and made the imposition of sanctions discretionary.<sup>52</sup> In addition, the drafters revised the factual certification burden by permitting attorneys to plead allegations based upon information and belief so long as they represent that the allegations are likely to have evidentiary support after a reasonable opportunity for discovery.<sup>53</sup> The Advisory Committee emphasized, however, that "if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the Rule not to persist with that contention."<sup>54</sup>

The 1993 version also changed the legal certification requirement. Under the 1983 version, an attorney's signature certified that the attorney had read the "pleading, motion or other paper" and that "to the best of [his or her] knowledge, information and belief," the paper was "well grounded in fact and [was] warranted by existing law or a *good faith* argument for the extension, modification, or reversal of existing law . . . ."<sup>55</sup> The current rule significantly altered this standard by providing that a lawyer's certification represents that the filing in question is "warranted by existing law or by a *nonfrivolous* argument for the extension, modification, or reversal of existing law *or the establishment of new law*."<sup>56</sup> Furthermore, the certification requirement is now applicable to each claim, defense, or legal contention contained within a pleading, rather than to the pleading as a whole—an important point that was not clear under the 1983 version.<sup>57</sup>

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(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

FED. R. CIV. P. 11.

<sup>51</sup> Under the rule, "presentation" includes "signing, filing, submitting or later advocating."

FED. R. CIV. P. 11(b). The 1983 version only referred to "signing." See *supra* note 35.

<sup>52</sup> FED. R. CIV. P. 11(c) ("[T]he court *may* . . . impose an appropriate sanction . . .") (emphasis added).

<sup>53</sup> FED. R. CIV. P. 11(b)(3) and advisory committee's note to 1993 amendments. In addition, the rule now acknowledges that denials of factual allegations may be "reasonably based on a lack of information or belief" so long as they are "specifically so identified." FED. R. CIV. P. 11(b)(4). None of this was possible under the 1983 version.

<sup>54</sup> FED. R. CIV. P. 11 advisory committee's note to 1993 amendments.

<sup>55</sup> FED. R. CIV. P. 11 (1983) (emphasis added). For the entire text of the 1983 version, see *supra* note 35.

<sup>56</sup> FED. R. CIV. P. 11(b)(2) (emphasis added).

<sup>57</sup> See *id.*; Schwarzer, *New Era*, *supra* note 26, at 14–15 ("The certification . . . clearly runs separately to each of the claims, defenses and contentions, not only to the paper as a whole."). Compare *Frantz v. United States Powerlifting Federation*, 836 F.2d 1063, 1067 (7th Cir. 1987) ("Rule 11 applies to all statements in papers it covers. Each claim must have sufficient support; each must be investigated and researched before filing.") with *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986) (holding that the 1983 version of Rule 11 "permit[ted] the imposition of sanctions only when the 'pleading, motion, or other paper'

The most unique and important change to the rule, however, was the adoption of a so-called "safe harbor" provision.<sup>58</sup> This portion of the rule precludes a party from simply filing a Rule 11 motion against an adversary when there is a belief that a violation has occurred. Instead, the "movant" must first *serve* the motion,<sup>59</sup> in accordance with Federal Rule of Civil Procedure 5,<sup>60</sup> and then wait twenty-one days.<sup>61</sup> During that twenty-one day period, the alleged Rule 11 offender may withdraw or correct the challenged "paper, claim, defense, contention, allegation, or denial" without any fear of sanctions under Rule 11.<sup>62</sup> The movant may only

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itself [was] frivolous, not when one of the arguments in support of a pleading or motion [was] frivolous").

<sup>58</sup> FED. R. CIV. P. 11(c)(1)(A); *see also* Keeling, *supra* note 13, at 1091; Vairo, *Where We Are*, *supra* note 43, at 498.

<sup>59</sup> The 1993 version of Rule 11 requires that a motion for sanctions thereunder may only be initiated by way of a separate motion that specifically sets forth the conduct that allegedly violates the rule. *See* FED. R. CIV. P. 11(c)(1)(A). This added requirement was no doubt intended to discourage somewhat the pursuit of Rule 11 sanctions. *See* Tobias, *1993 Revision*, *supra* note 20, at 207 (noting that the separate motion requirement was at least in part "intended to make pursuit of sanctions more onerous, thereby reducing Rule 11 activity"); Vairo, *Where We Are*, *supra* note 43, at 498 (observing that separate motion requirement was, in part, "intended to reduce the . . . practice of making threats or sending vague 'Rule 11 letters' to bully an opponent into withdrawing a paper or position"); *accord* Georgene M. Vairo, *The New Rule 11: Past as Prologue?*, 28 LOY. L.A. L. REV. 39, 63 (1994) [hereinafter Vairo, *Past as Prologue*].

<sup>60</sup> The pertinent part of Rule 5 provides that:

Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney's or party's last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

FED. R. CIV. P. 5(b).

<sup>61</sup> FED. R. CIV. P. 11(c)(1)(A).

<sup>62</sup> *See id*; *see also* Cavanagh, *supra* note 32, at 396; Keeling, *supra* note 13, at 1091-92; Cynthia A. Leiferman, *The 1993 Rule 11 Amendments: The Transformation of the Venomous Viper into the Toothless Tiger*, 29 TORT & INS. L.J. 497, 502-03 (1994). It should be noted, however, that Professor Jeffrey Parness has argued that "correction or withdrawal of Rule 11 violations will not absolutely protect attorneys against all sanctions for conduct preceding a notice of [challenge]." Parness, *Disciplinary Referrals*, *supra* note 24, at 45. Specifically, Professor Parness reads the safe harbor provision as only insulating violators from potential monetary sanctions. Jeffrey A. Parness, *The New Federal Rule 11: Different Sanctions, Second Thoughts*, 83 ILL. B.J. 126, 128 (1995) [hereinafter Parness, *Different Sanctions*] ("The new Rule 11 allows court initiatives and public interest sanctions on all rule violations, whether or

file the motion with the court if the non-movant fails to take any action during the twenty-one day safe harbor period.<sup>63</sup>

These dramatic changes to Rule 11<sup>64</sup> were clearly intended to respond to problems and complaints associated with the 1983 version and, specifically, reduce the excessive use and abuse of the rule and lessen the perceived chilling effect on certain categories of litigants.<sup>65</sup> In the midst of all the revisions, however, the one aspect of Rule 11 that remained unchanged was the rule's ultimate goal of deterrence.<sup>66</sup> Indeed, if anything, the drafters sought to emphasize and enhance this one Rule 11 constant.<sup>67</sup>

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not corrected during any safe harbor period.”) (citing advisory committee notes to 1993 amendments of Rule 11(c)); Parness, *Disciplinary Referrals*, *supra* note 24, at 45; *accord* Stavits, *supra* note 43, at 609 (noting that the “safe harbor” provision does not prevent a court from initiating sanctions, but in that case it may not impose monetary sanctions if the violating party voluntarily dismissed its action or settled the case”). While Professor Parness’s interpretation seems textually plausible, the only way that a court could exercise its authority to impose a non-monetary Rule 11 sanction would be if it were aware that an attorney had withdrawn or corrected an offending paper pursuant to the safe harbor provision. There is, however, very little, if any, likelihood that a court will ever learn about such a correction or withdrawal unless non-offending counsel apprises the court. *See* Parness, *Disciplinary Referrals*, *supra* note 24, at 45 (acknowledging that “trial judges may have difficulty learning about some of the very rule violations they might wish to sanction in the public interest”); *see also infra* notes 109–11 and accompanying text. Requiring or expecting counsel to do this would seriously undermine one major rationale behind the safe harbor provision—reducing the burden on courts in dealing with the high volume of Rule 11 motions. *See infra* notes 84, 103 and accompanying text.

<sup>63</sup> *See* FED. R. CIV. P. 11(c)(1)(A).

<sup>64</sup> Other changes to Rule 11 included: (1) the requirement that the imposition of sanctions be preceded by “notice and a reasonable opportunity to be heard” (Rule 11(c)); (2) emphasis on the fact that an attorney’s law firm should typically be held jointly responsible for violations committed by the attorney (Rule 11(c)(1)(A)); (3) prohibition against imposition of monetary sanctions on a represented party for the presentation of a frivolous legal argument (Rule 11(c)(2)(A)); and (4) making Rule 11 wholly inapplicable to discovery (Rule 11(d)).

<sup>65</sup> *See, e.g.,* Keeling, *supra* note 13, at 1153 (observing that “1993 amendments attempt to lessen the chilling effect of the rule with various procedural devices,” including the safe harbor provision); Schwarzer, *New Era*, *supra* note 26, at 12 (noting that the “overriding purpose of the 1993 amendments was . . . to remedy problems perceived to have arisen in the interpretation of the 1983 [version]”); Tobias, *Why Congress*, *supra* note 39, at 277 (noting that the “rule revisers meant to reduce Rule 11’s invocation and concomitant satellite litigation by decreasing incentives to rely on Rule 11”).

<sup>66</sup> *See* Cavanagh, *supra* note 32, at 400 (observing that “deterrence is the principal goal of the sanctioning process” under the 1993 version of Rule 11); Pointer Letter, Attachment B, *supra* note 43, at 3, *reprinted in* 146 F.R.D. at 523 (“The goal of the 1983 version remains a proper and legitimate one, and its insistence that litigants ‘stop-and-think’ before filing pleadings, motions, and other papers should, in the opinion of the Committee, be retained.”); Ripps and Drowatzky, *supra* note 26, at 78–79 (noting that the 1993 “changes did not alter the Rule’s purpose of preventing litigation abuses”); Tobias, *1993 Revision*, *supra* note 20, at 184 (noting the advisory committee’s intention to “emphasize . . . that the Rule’s principal purpose

The most obvious evidence of this was the shift in the sanctioning focus of the rule from an emphasis on the award of attorneys' fees as the sanction of choice<sup>68</sup> to the encouragement of sanctions designed to deter the filing of frivolous or abusive claims.<sup>69</sup> The rule now specifically provides that:

A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated . . . [T]he sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.<sup>70</sup>

The Advisory Committee also observed that "[s]ince the purpose of Rule 11 sanctions is *to deter rather than to compensate*, the rule provides that, if a

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was to deter litigation abuse"). *But see* Vairo, *Rule 11*, *supra* note 26, at 619 (observing that "although the 1993 amendments . . . made clear that the purpose of Rule 11 is purely deterrence, there continues to be broad support among the bench and bar for Rule 11 to incorporate a compensatory as well as a deterrent purpose").

<sup>67</sup>The Advisory Committee noted that it drafted the proposed amendment to the rule "with the objective of increasing the fairness and effectiveness of the rule as a means to deter presentation and maintenance of frivolous positions, while also reducing the frequency of Rule 11 motions." Pointer Letter, Attachment B, *supra* note 43, at 3, *reprinted in* 146 F.R.D. at 523; *see also infra* text accompanying note 71. Although courts have no doubt attributed various purposes to Rule 11, it cannot be disputed that the primary intent underlying the rule has always been to deter abusive litigation conduct generally. *See* Vairo, *Rule 11*, *supra* note 26, at 619 (noting that the 1993 amendments to Rule 11 clarified that the "purpose of Rule 11 is purely deterrence"); *see also* *Bus. Guides, Inc. v. Chromatic Communications Enter.*, 498 U.S. 533, 553 (1991) (noting that "[t]he main objective of [Rule 11] is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses"); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) (noting that any interpretation of Rule 11 "must give effect to the Rule's central goal of deterrence"), *superseded by* FED. R. CIV. P. 11 (1993); *Pavelic & LeFlore v. Marvel Enter. Group*, 493 U.S. 120, 130 (1989) (Marshall, J., dissenting) (noting that Rule 11 was "explicitly designed to deter improper pleadings, motions, and papers"), *superseded by* FED. R. CIV. P. 11 (1993); Vairo, *Critical Analysis*, *supra* note 22, at 203-04.

<sup>68</sup>Under the 1983 version of Rule 11, an award of attorneys' fees or other monetary penalty was clearly the most frequent sanction imposed. *See* RULE 11 IN TRANSITION, *supra* note 43, at 36-37; Cavanagh, *supra* note 32, at 389, 401; Keeling, *supra* note 13, at 1082; Vairo, *Critical Analysis*, *supra* note 22, at 227; Vairo, *Rule 11*, *supra* note 26, at 619; *see also* Marshall et al., *supra* note 32, at 956-57 (observing that although monetary sanctions were overwhelmingly the most frequent, the amount of those awards did not seem to be as large as Rule 11 publicity might suggest). *See generally* WILLGING, *supra* note 29, at 125-40.

<sup>69</sup>*See* Schwarzer, *New Era*, *supra* note 26, at 22 ("The revision is consistent with the emphasis of the [1993] amendment[s] on furthering professional behavior as opposed to sanctioning misbehavior."); *see also* Cavanagh, *supra* note 32, at 396.

<sup>70</sup>FED. R. CIV. P. 11(c)(2).

monetary sanction is imposed, it should ordinarily be paid into court as a penalty.<sup>71</sup> The Committee apparently wanted courts to resort to awarding attorneys' fees in only rare instances.<sup>72</sup> In fact, the Committee went so far as to list various types of sanctions that it deemed more appropriate to further the central deterrence purpose of the rule, including such "disciplinary-type" sanctions as: "issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities."<sup>73</sup>

This focus on deterrence, however, while appropriate, is ironically inconsistent with the presence of a "safe harbor" provision in the rule, which allows litigation misconduct to go unpunished and undeterred in exchange for a reduction in the volume of Rule 11 motions.<sup>74</sup> This dissonance is difficult to reconcile, and to paraphrase Justice Scalia, seems to take the teeth out of Rule 11.<sup>75</sup>

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<sup>71</sup> FED. R. CIV. P. 11 advisory committee's note to 1993 amendments (emphasis added).

<sup>72</sup> See *id.* (noting that "under *unusual circumstances*" it may be necessary to "direct[ ] that some or all of a [monetary sanction] be [paid] to those injured by the violation") (emphasis added); see also JEROLD S. SOLOVY ET AL., SANCTIONS UNDER RULE 11 146-47 (1999).

<sup>73</sup> FED. R. CIV. P. 11 advisory committee's note to 1993 amendments; see also WILLGING, *supra* note 29, at 137 (noting study findings that disciplinary referrals were rarely used as substitute for Rule 11 sanctions); Theodore C. Hirt, *A Second Look at Amended Rule 11*, 48 AM. U. L. REV. 1007, 1040-41 (1999) (noting that only a few courts have exercised the option of referring attorneys to state disciplinary bodies as a Rule 11 sanction). It should also be noted that under the 1993 version, a court imposing sanctions must "describe the conduct determined to constitute a violation . . . and explain the basis for the sanction imposed." FED. R. CIV. P. 11(c)(3); see Vairo, *Rule 11*, *supra* note 26, at 631-42.

<sup>74</sup> See, e.g., Leiferman, *supra* note 62, at 503 (noting that safe harbor provision is "antithetical to the fundamental deterrence objective of Rule 11"). But see JOSEPH, *supra* note 30, at 314 (also noting potential for sanctions under 28 U.S.C. § 1927 and the courts' inherent powers); Cavanagh, *supra* note 32, at 399-400 (noting that even those who withdraw or correct a claim within the safe harbor period are still potentially subject to sanctions pursuant to 28 U.S.C. § 1927 and the inherent powers of the court); Parness, *Different Sanctions*, *supra* note 62, at 128 (noting that the 1993 version of Rule 11 promotes deterrence insofar as it even allows for "sanctions against those whose frivolity is short-lived, and perhaps caused little harm to opponents and to the judicial system"). For a brief discussion of why other federal sanction possibilities are not viable alternatives to Rule 11, see *infra* notes 114-20 and accompanying notes.

<sup>75</sup> See Leiferman, *supra* note 62, at 503 (discussing Justice Scalia's dissent regarding the 1993 amendments); see also Dissenting Statement of Scalia, J., Supreme Court of the United States, Amendments to the Federal Rules of Civil Procedure 1 (Apr. 2, 1993), reprinted in 146 F.R.D. 507, 507 (1993) [hereinafter Scalia Dissent]. Justice Scalia specifically noted that: "Under the revised Rule, parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: If objection is raised, they can retreat without penalty." *Id.* at 2, reprinted in 146 F.R.D. at 507-08 (1993). But see Cavanagh, *supra* note 32, at 399-400; Parness, *Disciplinary Referrals*, *supra* note 24, at 45; Parness *Different Sanctions*, *supra* note 62, at 128.

### B. The Discord Created by the "Safe Harbor" Provision

Under the 1983 version of Rule 11 and the pertinent case law, once an attorney discovered that his or her position was "frivolous," there was very little incentive to dismiss or withdraw the pleading.<sup>76</sup> Specifically, the Supreme Court announced in *Cooter & Gell v. Hartmarx Corp.*,<sup>77</sup> that voluntary dismissal of a baseless claim did not divest a district court of jurisdiction to consider a potential Rule 11 violation.<sup>78</sup> Hence, a lawyer who knew or was fearful that a challenged claim or contention lacked legal or factual merit would have been unwise to withdraw the pleading voluntarily, because withdrawal could have been interpreted as an admission and would have increased the probability for a successful Rule 11 motion.<sup>79</sup> Moreover, even if opposing counsel declined to file a Rule 11 motion, the risk remained that the court might impose sanctions *sua sponte* for a violation.<sup>80</sup> Consequently, under the 1983 version, it behooved an attorney to maintain his or her questionable pleading and roll the dice.<sup>81</sup>

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<sup>76</sup> See Pointer Letter, Attachment B, *supra* note 43, at 3, reprinted in 146 F.R.D. at 523 (noting that the 1983 version of Rule 11 "provide[d] little incentive, and perhaps a *disincentive*, for a party to abandon positions after determining they are no longer supportable") (emphasis added); see also FED. R. CIV. P. 11 advisory committee's note to 1993 amendments ("Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11 . . ."); Vairo, *Past as Prologue*, *supra* note 59, at 70–71.

<sup>77</sup> 496 U.S. 384 (1990), *superseded by* FED. R. CIV. P. 11 (1993).

<sup>78</sup> *Id.* at 398.

<sup>79</sup> See *supra* note 76; Cavanagh, *supra* note 32, at 395 (observing that under the 1983 version "the very act of voluntary dismissal [could] be used as evidence that the claim was baseless"); *Lawyers' Responsibilities*, *supra* note 4, at 1640 (noting reluctance to correct claims under the 1983 version because such correction could be viewed as an admission of liability).

<sup>80</sup> See FED. R. CIV. P. 11 (1983) ("If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or *upon its own initiative* shall impose . . . an appropriate sanction . . .") (emphasis added).

<sup>81</sup> As noted earlier, at least one commentator, Professor Charles Yablon, has posited that there is no such thing as a frivolous lawsuit. According to him, what the legal profession typically labels as a "frivolous" or "baseless" action is really a lawsuit with a low probability of success. See Yablon, *supra* note 20, at 67. It appears to be Professor Yablon's position that very few individuals, if any, are foolish enough to file an action or maintain a position that has zero probability of success. Thus, according to him, the types of cases that are on the receiving end of Rule 11 sanctions are actually cases with a low probability of success. See *id.*

Somewhat consistent with Professor Yablon's observation, Professor Maureen Armour has noted that courts do in fact impose Rule 11 sanctions in "close cases," not just the obviously frivolous or "easy" ones. See Maureen Armour, *Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case*, 50 SMU L. REV. 493 (1997); see also *Lawyers' Responsibilities*, *supra* note 4, at 1649–50 (noting evidence of strong potential for judges to disagree over what constitutes a frivolous case such as to warrant Rule 11 sanctions). If the decision regarding whether a given claim or contention is frivolous is difficult or a "close call," then logic seems to suggest that the claim or contention is not in fact frivolous. See Armour,

Among other reasons, the "safe harbor" provision was added to Rule 11 to eliminate the rule's disincentive toward withdrawal of frivolous claims.<sup>82</sup> An attorney can now dismiss, withdraw, or correct a claim or position with virtually no fear of being hit with a Rule 11 sanction.<sup>83</sup> This has the positive effect of potentially reducing the number of Rule 11 motions actually filed, which in turn decreases the amount of satellite litigation generated by the rule.<sup>84</sup>

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*supra* at 553–54, 555 (questioning the logic and efficacy of imposing Rule 11 sanctions in cases where determining the existence of a violation is a close call); *cf.* Stempel, *supra* note 42, at 261 (proposing institution of a "safe harbor" presumption against Rule 11 sanctions when a claim survives pre-verdict dismissal). These difficult or close decisions are not the sort of cases that are the scourge of the legal profession, and hence, are not the ones that this article's proposal is designed to address.

<sup>82</sup>FED. R. CIV. P. 11 advisory committee's note to 1993 amendments; *see also* Cavanagh, *supra* note 32, at 395 (noting that the 1983 version, as interpreted in *Cooter & Gell*, provided a "strong disincentive to offending parties to discontinue actions on their own motion"); Keeling, *supra* note 13, at 1091–92 (noting that a purpose of the "safe harbor" provision was to reduce the "chilling" effect of Rule 11 "by insulating litigants from sanctions for correctable mistakes"); Leiferman, *supra* note 62, at 503 (observing that the safe harbor provision was added to the 1993 version of Rule 11 "to eliminate the fear that withdrawal of an untenable position would subject a party to Rule 11 sanctions"). *But see* Vairo, *Past as Prologue*, *supra* note 59, at 64–65 (articulating belief that the "safe harbor" provision may serve only to push back the point at which chilling occurs rather than actually reduce the potential chilling effect of Rule 11); *Lawyers Responsibilities*, *supra* note 4, at 1644–46 (observing that various aspects of the 1993 version of Rule 11 may actually increase the "chilling" effect previously associated with Rule 11).

<sup>83</sup>*See* Scalia Dissent, *supra* note 75, reprinted in 146 F.R.D. at 508. *But see* Parness, *Disciplinary Referrals*, *supra* note 24, at 45; Parness, *Different Sanctions*, *supra* note 62, at 128. As Professor Parness has observed, there appears to be at least a possibility that non-monetary sanctions can be imposed by a trial court, even after an offending paper has been dismissed, withdrawn, or corrected. *See id.* Nevertheless, the likelihood of this happening seems far too remote to be of much, if any, concern to lawyers or litigants. *See infra* notes 109–11 and accompanying text.

<sup>84</sup>As Judge Schwarzer has noted:

By inducing, if not compelling, opposing lawyers to communicate with each other, [the safe harbor] provision also furthers the aims of Rule 1 [of the Federal Rules of Civil Procedure], as the amendments intend. It reflects a widely held view that much costly and time-consuming litigation activity could be avoided if lawyers talked to each other before they acted.

Schwarzer, *New Era*, *supra* note 26, at 20; *see also* FED. R. CIV. P. 11 advisory committee's note to 1993 amendments; JOSEPH, *supra* note 30, at 314; Vairo, *Past as Prologue*, *supra* note 59, at 71; *Lawyers' Responsibilities*, *supra* note 4, at 1641. A 1995 survey of judges and attorneys revealed that the majority of judges polled believed that Rule 11 activity under the 1993 version had either remained the same (37%) or decreased (39%). *See* JOHN SHAPARD ET AL., FEDERAL JUDICIAL CENTER, REPORT OF A SURVEY CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE 4 (1995) [hereinafter 1995 FJC REPORT]; *see also infra* note 103. It should also be noted that the survey indicated that 70% of the judges and 69% of the lawyers polled either moderately or strongly supported the safe harbor provision. *See id.*



The problem, though, is that the drafters removed the “withdrawal disincentive” from Rule 11 by replacing it with an incentive to be careless, reckless, or maybe even willful with regard to the assertion of questionable claims or positions.<sup>85</sup> As noted, under the 1983 version, a lawyer was wise to maintain a claim or position, once asserted, and gamble on whatever probability of success there might be.<sup>86</sup> Under the 1993 version, however, a lawyer can play the odds at the pleading or filing stage, and if opposing counsel “calls” him or her on a shaky claim or contention, the attorney can simply dismiss or withdraw it.<sup>87</sup> As a result, the safe harbor provision eviscerates any deterrent component that Rule 11 may have had,<sup>88</sup> and it actually penalizes the diligent attorney who expends the time,

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<sup>85</sup> Indeed, the Court in *Cooter & Gell v. Hartmarx Corp.*, predicted as much, noting that “[i]f a litigant could purge his violation of Rule 11 merely by taking a dismissal, he would lose all incentive to ‘stop, think and investigate more carefully before serving and filing papers.’” 496 U.S. 384, 398 (1990) (quoting Amendments to Federal Rules of Civil Procedure, 97 F.R.D. 165, 192 (1983) (Letter from Judge Walter Mansfield, Chairman, Advisory Committee on Civil Rules, to Judge Edward T. Gignoux, Chairman, and Members of the Standing Committee on Rules of Practice and Procedure) (Mar. 9, 1982)); see also Howard A. Cutler, Comment, *A Practitioner’s Guide to the 1993 Amendment to Federal Rule of Civil Procedure 11*, 67 TEMP. L. REV. 265, 267, 287–88 (1994) (noting potential for safe harbor provision to foster abusive or harassing litigation tactics). But see *supra* note 62 (discussing the possibility that a court may impose non-monetary sanctions notwithstanding withdrawal or correction under the safe harbor provision).

Another commentator has aptly noted that without an adequate system for enforcing penalties for litigation abuse, lawyers are much more likely to view the litigation process in a “gaming” fashion:

Absent a significant threat of enforcement, the desire to win for one’s client is likely to influence strategic choices about what moves to take and whether to risk rule infractions. Lawyers will not adequately screen out implausible contentions or refrain from unreasonably contentious behavior unless a system exists for enforcing articulated standards.

Maute, *supra* note 12, at 48; cf. Molot, *supra* note 17, at 994–1005 (discussing how general changes in the Federal Rules of Civil Procedure provide incentives for attorneys to pursue weak positions).

<sup>86</sup> See, e.g., Yablon, *supra* note 20; see also *supra* note 81.

<sup>87</sup> See FED. R. CIV. P. 11(c)(1)(A); see also *Lawyers’ Responsibilities*, *supra* note 4, at 1641 (noting that the safe harbor provision may encourage parties to “argue everything imaginable”).

<sup>88</sup> One commentator vividly demonstrated the serious detrimental impact that the safe harbor provision could potentially have on the deterrence objective of Rule 11 by way of an analogy to the criminal justice system:

[I]f the criminal justice system allowed a thief to avoid prosecution by returning stolen property within twenty-one days after apprehension, it seems improbable that a threatened jail sentence would deter future thefts. Rather, just as the early parole system spurred recidivism, the “safe harbor” provision of new Rule 11 may encourage litigants to plead claims and name parties without adequate factual or legal inquiry and run the unforbidding risk of having to withdraw the contention under challenge.

effort, and money to prepare and *serve* a Rule 11 motion that, though effective, in the end amounts to little more than an expensive secret threat.<sup>89</sup>

Nonetheless, one can argue that the safe harbor provision encourages creativity and protects those who file novel claims or claims that are well founded, but that initially lack evidentiary support.<sup>90</sup> Such an argument, however, is neither logical nor consistent with the drafters' actual intent.<sup>91</sup> Indeed, nothing in the advisory committee's notes to the 1993 amendments suggests that the safe harbor provision was intended to encourage creativity among the bar.<sup>92</sup>

Furthermore, creative but supportable claims are already permitted. Rule 11 expressly provides that its dictates are not violated when one asserts a contention that is supported by a "nonfrivolous argument for the extension, modification, or reversal of existing law, or the establishment of new law."<sup>93</sup> An attorney who believes this to be the case with respect to a particular claim or contention would

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Leiferman, *supra* note 62, at 503; *see also* Cooter & Gell, 496 U.S. at 398; Scalia Dissent, *supra* note 75, reprinted in 146 F.R.D. at 508; *Lawyers' Responsibilities*, *supra* note 4, at 1641 (noting that the "perverse incentives" created by the safe harbor provision may undermine the provision's benefits). *But see* Parness, *Different Sanctions*, *supra* note 62, at 128.

<sup>89</sup> *See* FED. R. CIV. P. 11(c)(1)(A); *see also* HAZARD & HODES, *supra* note 2, § 27.9, at 27-20 (noting that the safe harbor provision may tempt "Rambo" lawyers to "file a series of frivolous papers, put the other side to the trouble and expense of preparing a motion, and then withdraw the paper on the twentieth day"); Cavanagh, *supra* note 32, at 399 (observing that the "good guy foots the bill and the bad guy walks away scot-free"); Hirt, *supra* note 73, at 1023 (noting potential for counsel to abuse the safe harbor provision by pursuing frivolous positions and then withdrawing them, "thereby wasting the opponents' time and diverting them from other litigation tasks"). The advisory committee notes indicate that counsel should typically "give informal notice to the other party, whether in person or by telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion." FED. R. CIV. P. 11 advisory committee's note to 1993 amendments. Personal experience and common sense, however, suggest that this "informal notification" may have little impact given that only the actual service of a formal motion can trigger the running of the twenty-one day safe harbor period. *See id.* Notwithstanding the foregoing, it must be acknowledged that attorneys may also utilize the 1993 version of Rule 11 offensively as a litigation weapon by threatening Rule 11 motions even when not warranted. Such lawyers will likely invest little time in the preparation of their "threat," while the recipient thereof may "withdraw" or "dismiss" out of fear, or may expend unnecessary time and money in investigating and responding to the threat. *See* Tobias, *Civil Rights Plaintiffs*, *supra* note 40, at 1785 (noting that lawyers may use Rule 11 offensively to put opposing counsel to unnecessary expense through a "threat and retreat" strategy); *see also* Tobias, *1993 Revision*, *supra* note 20, at 207-08, 212; Tobias, *Reconsidering*, *supra* note 40, at 876-77; Cutler, *supra* note 85, at 288.

<sup>90</sup> *See* Tobias, *Civil Rights Plaintiffs*, *supra* note 40, at 1784-85; Tobias, *1993 Revision*, *supra* note 20, at 207; Tobias, *Reconsidering*, *supra* note 40, at 876; Vairo, *Rule 11*, *supra* note 26, at 643; *see also* Nelken, *Looking for Middle Ground*, *supra* note 44, at 404-05.

<sup>91</sup> *See generally* FED. R. CIV. P. 11 advisory committee's note to 1993 amendments. If anything, the provision appears to have been designed to insulate those who make mistakes in connection with their court-filed papers. *See, e.g.*, Keeling, *supra* note 13, at 1091-93.

<sup>92</sup> *See generally* FED. R. CIV. P. 11 advisory committee's note to 1993 amendments.

<sup>93</sup> FED. R. CIV. P. 11(b)(2).

in all likelihood assert and maintain such position even in the absence of the safe harbor provision.<sup>94</sup>

Moreover, other revisions to Rule 11 alleviate what was perceived as the rule's disproportionate impact on civil rights plaintiffs.<sup>95</sup> Under the 1983 version, both the fact that sanctions were mandatory and that there was a significant risk that a large attorney fee award would be the sanction of choice<sup>96</sup> were believed to have had a stifling effect on the filing of legitimate civil rights claims.<sup>97</sup> The 1993 version of Rule 11 has dramatically altered the calculus for deciding whether or not to file such claims. Under the current rule, sanctions are no longer mandatory;<sup>98</sup> the potential for a large attorney fee award if a Rule 11 violation is found has been virtually eliminated;<sup>99</sup> and civil rights plaintiffs who believe that they have a legitimate claim, but lack sufficient supporting evidence at the pleading stage of a case, are now expressly permitted to plead based upon information and belief—so long as they indicate that the claims are likely to have evidentiary support after a reasonable opportunity for discovery.<sup>100</sup> In light of these changes, irrespective of the safe harbor provision, litigants who possess potentially meritorious claims should be more apt to pursue them.

Who then does the safe harbor provision protect? For the most part, it protects the careless, the incompetent, and the ill-intentioned.<sup>101</sup> The only one of these three categories arguably deserving of some protection is "the careless,"<sup>102</sup>

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<sup>94</sup> It must be acknowledged, however, that to the extent that a stiff penalty is a viable possibility, even a lawyer who feels strongly about his or her novel legal position may "cave" in the face of a Rule 11 threat. This was certainly the case under the 1983 version, and to a much more limited extent, it no doubt remains a possible reaction under the 1993 version. *See, e.g.,* Marshall et al., *supra* note 32, at 960–61 (noting that knowledge of potential for sanctions under the 1983 version of Rule 11 significantly impacted the pre-filing behavior of attorneys); Nelken, *Looking for Middle Ground*, *supra* note 44, at 393–99 (discussing the chilling effect created as a result of the imposition of significant monetary sanctions under the 1983 version of Rule 11).

<sup>95</sup> *See, e.g.,* Tobias, *Civil Rights Plaintiffs*, *supra* note 40, at 1791 (noting that various changes to Rule 11 should decrease the chilling aspect of the rule).

<sup>96</sup> *See supra* note 68 and accompanying text.

<sup>97</sup> *See supra* notes 43–44.

<sup>98</sup> *See* FED. R. CIV. P. 11(c).

<sup>99</sup> *See supra* notes 68–73 and accompanying text.

<sup>100</sup> *See* FED. R. CIV. P. 11(b)(3). *But see* Tobias, *1993 Revision*, *supra* note 20, at 203 (noting that in connection with the opportunity to plead on "information and belief," plaintiffs may have problems recognizing which contentions will have evidentiary support, as well as what constitutes a "reasonable opportunity" for discovery).

<sup>101</sup> *Cf.* Schwarzer, *Sanctions*, *supra* note 11, at 201 (noting with regard to the 1983 version of Rule 11 that violations thereof may be attributed to "inexperience, incompetence, neglect, wilfulness or deliberate choice"). Judge Schwarzer has also correctly observed that the level of punishment and deterrence necessary should vary depending upon the cause of the violation. *Id.*

<sup>102</sup> *See* Vairo, *Past as Prologue*, *supra* note 59, at 64 ("A litigant who has made a mistake should have the opportunity to withdraw a paper without suffering sanctions."); *accord* Vairo, *Where We Are*, *supra* note 43, at 498; *see also* Schwarzer, *Sanctions*, *supra* note 11, at 201 (suggesting that lesser punishment and less need for deterrence may be called for under Rule 11

unless the carelessness is recurrent, which then suggests incompetence. Although there do not appear to be statistics showing why attorneys utilize the safe harbor provision, it seems reasonable to speculate that the overwhelming majority of those who do take advantage of the provision fall into one of the aforementioned categories—at least two of which are completely unworthy of any protection.

Given this likelihood, the obvious question is: why retain the safe harbor provision? The most reasonable explanation is to prevent federal judges from having to waste valuable time addressing unmeritorious claims and defenses filed by these three categories of attorneys, either through the actual granting of Rule 11 motions or by way of rulings on dispositive motions.<sup>103</sup> This judicial economy explanation is not only plausible, but also makes a powerful case for the continued existence of the safe harbor provision. Nevertheless, some commentators have suggested that the safe harbor provision be eliminated.<sup>104</sup> They seem to agree with Justice Scalia that the presence of a “safe harbor” simply encourages carelessness and abuse in the pleading process and therefore is of little value.<sup>105</sup> The position of these “safe harbor” critics, however, likely stems from the impulse to focus solely on the inconsistency between the safe harbor provision and Rule 11’s goal of deterrence. Such a perspective fails to acknowledge fully

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depending upon the nature of the cause of the violation). *But see* SOLOVY, *supra* note 72, at 176 (noting that some courts have held that inexperience is no excuse for a Rule 11 violation).

<sup>103</sup> See JOSEPH, *supra* note 30, at 314 (noting that the safe harbor provision should reduce “Rule 11 volume while accomplishing the goal of the Rule—streamlining litigation by eliminating papers and contentions proscribed by the Rule—without burdening the Court”); 1995 FJC REPORT, *supra* note 84, at 4 (discussing some evidence that the safe harbor provision had reduced the amount of Rule 11 activity); Cavanagh, *supra* note 32, at 401 (observing that “the safe harbor provision can be viewed as enhancing judicial efficiency”); Laura Duncan, *Sanctions Litigation Declining*, A.B.A. J., Mar. 1995, at 12 (noting marked decrease in reported cases under the 1993 version as a likely by-product of the safe harbor provision); Vairo, *Past as Prologue*, *supra* note 59, at 64 (noting that the safe harbor provision “serves the streamlining purpose that the 1983 architects of Rule 11 originally envisioned”); *see also* *Lawyers’ Responsibilities*, *supra* note 4, at 1641. Other potential benefits include the elimination of the need for the “accused to prepare responding papers,” and the avoidance of delay in dealing with the merits of a case. Cavanagh, *supra* note 32, at 401.

<sup>104</sup> See, e.g., Ripps & Drowatzky, *supra* note 26, at 89. Indeed, in 1995, legislation was proposed in the United States House of Representatives that would have modified the 1993 version of Rule 11 by eliminating the safe harbor provision, among other things. This legislation, which was a section of the Common Sense Legal Reforms Act, was passed by the House, but never taken up by the Senate. See Barbara Comminos Kruzansky, Note, *Sanctions for Nonfrivolous Complaints? Sussman v. Bank of Israel and Implications for the Improper Purpose Prong of Rule 11*, 61 ALB. L. REV. 1359, 1371 (1998). For a discussion of this legislation, see Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 721–24 (1995). *But see* 1995 FJC REPORT, *supra* note 84, at 4 (indicating fairly substantial support among the bench and the bar for the safe harbor provision).

<sup>105</sup> Scalia Dissent, *supra* note 75, reprinted in 146 F.R.D. at 508.

the undeniable benefits to judicial administration created by the provision, which alone are sufficient to rebut any argument for its elimination.<sup>106</sup>

Thus, the question remains: what happens to the careless, incompetent, or ill-intentioned attorneys who avoid sanctions by resorting to the safe harbor provision? The very disconcerting answer is almost certainly “nothing.” In the context of a lawsuit itself, this is consistent with the judicial efficiency goal of amended Rule 11, already discussed.<sup>107</sup> Under the 1983 version of the rule, judges and litigants were perceived to have been devoting far too much time to sanctions issues, distracting their attention from the actual merits of particular litigation, and undermining the adversary process generally.<sup>108</sup> Unfortunately, the more judicially efficient, modern Rule 11 also insulates potentially unethical conduct, at least from sanction by the district courts themselves.

Furthermore, it is virtually inconceivable that an attorney who convinces opposing counsel to withdraw or correct an offending paper will take any additional action with regard to the matter.<sup>109</sup> Experience suggests that the successful attorney will view a withdrawal or correction by the Rule 11 violator as a victory of sorts; or at least that is how he or she will probably justify the fees charged for preparation of a Rule 11 motion that was never even filed.<sup>110</sup> The perception of most attorneys seems to be that Rule 11 is the only applicable ethical constraint regarding frivolous filings in federal district courts, and because the rule provides no apparent recourse following the exercise of “safe harbor” privileges, there is nothing left for a non-offending attorney to do.<sup>111</sup>

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<sup>106</sup> See *supra* note 103 and accompanying text; see also *supra* note 84.

<sup>107</sup> *Id.*

<sup>108</sup> See *supra* note 40–41 and accompanying text.

<sup>109</sup> See, e.g., Parness, *Disciplinary Referrals*, *supra* note 24, at 45 (noting that “private parties have little incentive to inform the court about Rule 11 misconduct, especially if it has been corrected”); see also *supra* note 89.

<sup>110</sup> Ironically, claims that attorneys may deem to be objectively ludicrous may call for very extensive research and argument in connection with a Rule 11 motion. This is so because the non-offending attorney likely will feel compelled to address any and all potential arguments that can be made by the offending attorney, both factual and legal. See *supra* note 89. In one case in which I was involved, besides conducting legal research regarding the invalidity of the offending lawyer’s claims, we also found it necessary to obtain affidavits from witnesses to show the absence of any evidentiary support for the claims. Our diligence had the desired effect (*on the twentieth day*), but at an unrecompensed price. For an example of the extensive time, effort, and expense that can be devoted to responding to patently frivolous claims, see *Frantz v. United States Powerlifting Federation*, 836 F.2d 1063 (7th Cir. 1987).

<sup>111</sup> Professor Parness has argued for adoption of local federal court rules that would require “lawyers to notify trial judges of egregious misconduct which has been corrected within the safe harbor period.” Parness, *Different Sanctions*, *supra* note 62, at 128; see also Parness, *Fines*, *supra* note 30, at 898–99. It would appear, however, that the enactment of such mandatory reporting rules within the federal court system itself could undermine the purpose of the safe harbor provision; see *supra* notes 103–06 and accompanying text. See also *supra* note 82 and accompanying text. Further, focusing only on specific instances of “egregious misconduct” fails

Hence, the incompetent, careless, and ill-intentioned lawyers are essentially accepted, tolerated, or rationalized as part and parcel of the adversary process, provided that they take refuge within the very rule designed to ferret out and prevent their litigation misconduct. This sends the disturbing message that it is acceptable for attorneys to misuse or abuse the system, so long as they are willing to cease doing so when challenged in a given case. Indeed, such behavior can theoretically be repeated indefinitely, both within a single case and from case to case, in light of the safe harbor provision.<sup>112</sup> Of course, given the protective nature of the safe harbor provision, there is no record that can be examined in order to verify the existence or identity of the serial abuser. Anecdotal evidence suggests, however, that such recidivism, so to speak, is more than just a hypothetical problem.<sup>113</sup>

It is possible that such abuse could be dealt with by pursuing a motion for sanctions under 28 U.S.C. § 1927<sup>114</sup> and/or the court's inherent authority, or through exercise of the courts' contempt powers.<sup>115</sup> Even so, given the various

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to address the problem of the habitual violator whose isolated conduct may not appear sufficiently "flagrant." The better alternative is to focus on altering the existing duty to report under the parallel state disciplinary systems, which covers both egregious and habitual, non-egregious violations of Rule 11. *See infra* Part IV; *see also* Parness, *Disciplinary Referrals*, *supra* note 24, at 61 (noting obligation of attorneys, under certain circumstances, to report even those lawyers who withdraw their papers under the safe harbor provision); Parness, *Fines*, *supra* note 30, at 898 & n.111 (appearing to acknowledge attorneys' obligation to report Rule 11-type violations to the appropriate disciplinary agencies).

<sup>112</sup> *See, e.g.*, HAZARD & HODES, *supra* note 2, § 27.9, at 27-20 (noting potential for abusive lawyers to file a "series of frivolous papers" in light of the safe harbor provision).

<sup>113</sup> Interviews of a sampling of experienced attorneys practicing in various areas of litigation revealed a general belief that such unrestrained serial abuse occurs, not merely because of the safe harbor provision, but perhaps more significantly, because of the perception that courts are unlikely to impose sanctions in any event. In other words, the perceived futility of pursuing relief under Rule 11 may lead many attorneys to simply "grin (or frown) and bear it." E-Mail Interview with Jeffrey O. Bramlett, Trial, Appellate, & Professional Liability Litigator, Bondurant, Mixon & Elmore, Atlanta, Ga. (February 13, 2001); Telephone Interview with John E. Burgess, Corporate Litigation Counsel, Georgia-Pacific Corp. (December 26, 2000); E-Mail Interview with John A. Chandler, Securities & Professional Liability Litigator, Sutherland, Asbill & Brennan LLP (February 15, 2001); E-Mail Interview with Kevin E. Grady, Antitrust & Healthcare Litigator, Alston & Bird LLP (February 16, 2001) (also suggesting that some of the unsanctioned, "abusive" lawyers actually resort to Rule 11 itself as a vehicle for harassment); *see also supra* notes 33, 88.

<sup>114</sup> Section 1927 provides that:

Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (1994) (emphasis added).

<sup>115</sup> *See* FED. R. CIV. P. 11 advisory committee's note to 1993 amendments (noting that Rule 11 "does not inhibit the court in punishing for contempt, in exercising its inherent powers,

problems attendant to such motions, as well as the widespread perception that resort to the safe harbor provision sounds the death knell for possible sanctions, section 1927-type relief does not appear to represent a meaningful alternative.

Specifically, the express language of this code section establishes that sanctions thereunder are proper for unreasonable and vexatious conduct that "multiplies the proceedings."<sup>116</sup> As a result, invocation of section 1927 is typically only appropriate for intentional or bad faith misconduct,<sup>117</sup> or at least conduct of a very egregious nature.<sup>118</sup> Consequently, it seems like little more than a throw-back to the 1938 version of Rule 11, which required a showing of subjective bad faith to establish a violation.<sup>119</sup> It follows, therefore, that utilization of section 1927 when Rule 11 is unavailable will carry with it the same types of problems associated with the 1938 version of Rule 11 (i.e., lack of use).<sup>120</sup> This seems like an obvious step in the wrong direction, particularly in light of the central deterrent purpose of the present version of Rule 11.

Thus, notwithstanding section 1927, there exists a strong potential for serial litigation misconduct in the face of Rule 11. This highlights the irreconcilable discordancy between the primary purpose of the rule—deterrence of frivolous filings—and the somewhat less important purposes of judicial and adversarial efficiency. Paradoxically, the latter seem to have been given primacy under the rule. If ethics in the pleading process or in motion practice are to mean anything, there must be some vehicle for resuscitating the deterrent component of Rule 11. The logical place to look for such a vehicle is the disciplinary process.<sup>121</sup>

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or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927"); JOSEPH, *supra* note 30, at 314; Cavanagh, *supra* note 32, at 399–400. *But see* Schwarzer, *New Era*, *supra* note 26, at 27 n.86 (noting that the courts' inherent powers and section 1927 are not substitutes for Rule 11 in light of the different conduct targeted and the greater standard of proof required).

<sup>116</sup> 28 U.S.C. § 1927 (1994).

<sup>117</sup> See HAZARD & HODES, *supra* note 2, § 27.11, 27-24 (noting that section 1927 has "generally been read to apply only upon a finding of intent to harass or at least recklessness"); 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 11.40 (3d ed. 1997) (noting that, under section 1927, "most circuits require a finding of bad faith").

<sup>118</sup> See MOORE ET AL., *supra* note 117, § 11.40 (recognizing that some circuits require a lower standard of misconduct to warrant sanctions under section 1927—for example, "reckless and indifferent conduct").

<sup>119</sup> See *supra* note 32; see also Vairo, *Rule 11*, *supra* note 26, at 594–95 (noting that the focus on making Rule 11 a more effective tool for improving attorney behavior was, at least in part, a reaction to the disuse of both section 1927 and the court's inherent power to sanction).

<sup>120</sup> See *supra* notes 31–33 and accompanying text; cf. *supra* note 113.

<sup>121</sup> See, e.g., Ripps & Drowatzky, *supra* note 26, at 84 (noting that "handling substantial Rule 11 violations through bar grievance committees would further enhance the purpose and important role of Rule 11").

### C. Model Rule of Professional Conduct 3.1

Though Rule 11 is typically viewed as the primary, if not lone, instrument for curtailing frivolous filings in federal district courts, it is not the only device available. Besides section 1927 and the courts' inherent authority,<sup>122</sup> each state has an independent disciplinary system charged with enforcing the state's ethical rules.<sup>123</sup> In the vast majority of states, the applicable rules are modeled in some fashion after the ABA Model Rules of Professional Conduct, although a significant minority base their rules on the earlier ABA Model Code of Professional Responsibility.<sup>124</sup> In a broad sense, these rules are intended to guide the behavior of attorneys and to provide them with a general "framework for the ethical practice of law."<sup>125</sup> In a more narrow sense, they consist of certain imperative standards, which if deviated from, can and should result in the imposition of appropriate disciplinary sanctions.<sup>126</sup>

The disciplinary systems vary somewhat from state to state in structure and operation.<sup>127</sup> However, they are similar insofar as certain rules are rarely, if ever, stringently enforced—mandatory phraseology notwithstanding.<sup>128</sup> One ethical imperative that has been routinely overlooked by the profession and seldom enforced by disciplinary authorities is Model Rule 3.1.<sup>129</sup> Indeed, the lack of

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<sup>122</sup> See *supra* notes 114–15 and accompanying text.

<sup>123</sup> See WOLFRAM, *supra* note 1, § 3.4.1, at 99; see also *supra* note 4.

<sup>124</sup> As noted previously, forty-four states and the District of Columbia have adopted or are in the process of adopting some variation of the ABA's Model Rules of Professional Conduct. See *supra* note 3. As a result of this and for the sake of clarity, this article will only focus on the Model Rules.

<sup>125</sup> MODEL RULES OF PROF'L CONDUCT, Scope ¶ 14 (2000), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 5.

<sup>126</sup> See *id.* Scope ¶ 13, reprinted in MORGAN & ROTUNDA, *supra* note 1, at 5 ("Some of the Rules are imperatives, cast in the terms 'shall' or 'shall not.' These define proper conduct for purposes of professional discipline.").

<sup>127</sup> See LAWYERS' MANUAL, *supra* note 3, at 101:2004.

<sup>128</sup> In addition, some commentators have also observed that, for various reasons, state disciplinary bodies are considered to be somewhat ineffective, generally, in dealing with attorney misconduct. See Grosberg, *supra* note 26, at 660; Vairo, *Rule 11*, *supra* note 26, at 590; Wilkins, *supra* note 1, at 822–30 (discussing the various problems that contribute to the ineffectiveness of the disciplinary system). But see Weston, *supra* note 32, at 921 (asserting that the "disciplinary process is utilized and is effective"); see also *infra* note 131.

<sup>129</sup> See RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS § 110 cmt. b (2000) (observing that "disciplinary enforcement against frivolous litigation is rare"); GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 386 (3d ed. 1999) (noting practical difficulties associated with enforcement of Model Rule 3.1 and its predecessor under the Model Code, DR 7-102(A)(1)); WOLFRAM, *supra* note 1, § 11.2.2, at 595 (noting that "discipline is rarely imposed for violations of the antiharassment rules"); Grosberg, *supra* note 26, at 657, 660 (noting that reliance on certain ethical rules, including Model Rule 3.1 "to improve lawyering has not begun to approach the extent to which... Rule 11 has been so used"); Kramer, *supra* note 26, at 797–98 (noting the failure of disciplinary bodies to enforce Model



enforcement of this rule, which closely parallels the language of Rule 11,<sup>130</sup> may have played a role with regard to the increased attention paid by federal courts to Rule 11 after 1983.<sup>131</sup>

Under Model Rule 3.1, “[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for the extension, modification or reversal of existing law.”<sup>132</sup> The similarities between this rule and Rule 11 are

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Rule 3.1 and DR 7-102(A)(1)); Wilkins, *supra* note 1, at 838 (noting that “disciplinary action is rarely taken against a lawyer for violating this longstanding professional command”).

<sup>130</sup> See *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 809 F.2d 584, 588–89 (9th Cir. 1987) (Noonan, J., dissenting) (observing that both Model Rule 3.1 and the 1983 version of Rule 11 “are properly seen as based on DR 7-102(A)(2) . . . in their treatment of what a lawyer should not do”); ABA CENTER FOR PROF’L RESPONSIBILITY, ANNOTATED MODEL RULES OF PROF’L CONDUCT 300 (4th ed. 1999) [hereinafter ANNOTATED MODEL RULES] (stating that “Rule 3.1 was conceptualized to address the same concerns as Rule 11”); RHODE, *supra* note 8, at 431 (noting that “Rule 11 parallels and to some extent replicates the prohibitions in bar disciplinary codes”); Carol Rice Andrews, *The First Amendment Problem with the Motive Restrictions in the Rules of Professional Conduct*, 24 J. LEGAL PROF. 13, 30 (2000) (observing that “[t]he stated aim of the ABA rulemakers in 1983, when they adopted the frivolous standard, was to track contemporaneous changes in the rules of civil procedure”) [hereinafter Andrews, *First Amendment*]; Grosberg, *supra* note 26, at 657, 658 (noting the similarities and overlap between Rule 11 and Model Rule 3.1, as well as other ethical rules); Weston, *supra* note 32, at 922 (observing that the Model Rules address the same problems as Rule 11); Wilkins, *supra* note 1, at 838 (observing that Rule 11 essentially “spell[s] out the traditional prohibition[s]” embodied in both DR 7-102(A)(2) and Model Rule 3.1); see also *infra* notes 132–51 and accompanying text.

<sup>131</sup> See Vairo, *Rule 11*, *supra* note 26, at 599. In particular, Professor Vairo emphasized that federal circuit courts utilized Rule 11 as a means for attacking certain unprofessional conduct, “which was precisely the conduct that had escaped sanction by organized disciplinary enforcement efforts.” *Id.* at 600; see also Kramer, *supra* note 26, at 798 (recognizing that “Rule 11 thus offer[ed] the federal courts an opportunity to enforce professional responsibility rules that state disciplinary bodies have been unable or unwilling to enforce”); cf. Schwarzer, *New Era*, *supra* note 26, at 23 (noting that the 1993 version of Rule 11 “provide[s] for enforcement of heightened professional obligations of lawyers engaged in civil litigation in the federal courts”). But see Weston, *supra* note 32, at 927 (observing that “sanctions rules create a new and unnecessary disciplinary process that is vastly inferior to the traditionally established procedure”).

<sup>132</sup> MODEL RULES OF PROF’L CONDUCT R. 3.1 (2000), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 61. The Model Code predecessor to Model Rule 3.1 provided that, in representing a client, a lawyer could not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

obvious and manifold. Like Rule 11, Model Rule 3.1 pays general, salutary lip service to the profession's ostensible intolerance of frivolous claims, defenses, or contentions asserted by attorneys. Though not nearly as detailed, the language of Model Rule 3.1, along with the accompanying comments, is virtually indistinguishable in substance and scope from the current version of Rule 11.<sup>133</sup> More particularly, both rules were enacted to address attorney misconduct in connection with positions taken or claims made in civil cases.<sup>134</sup> Each rule also acknowledges that factual support for claims and legal positions need not be fully established when initially asserted so long as such facts can be adequately developed through discovery.<sup>135</sup> Furthermore, an action is deemed "frivolous" under Model Rule 3.1

if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.<sup>136</sup>

This demonstrates that, in its present form, Model Rule 3.1 covers the same misconduct contemplated by Rule 11—papers interposed for an "improper

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MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(1)-(2) (1981), *reprinted in* MORGAN & ROTUNDA, *supra* note 1, at 228. Earlier, Canon 30 of the Canons of Professional Ethics laid the broad, aspirational groundwork for both Model Rule 3.1 and DR 7-102(A)(1)-(2):

The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

CANONS OF PROF'L ETHICS Canon 30 (1908), *reprinted in* MORGAN & ROTUNDA, *supra* note 1, at 809.

<sup>133</sup> Compare MODEL RULES OF PROF'L CONDUCT R. 3.1 (2000), *reprinted in* MORGAN & ROTUNDA, *supra* note 1, at 61, with FED. R. CIV. P. 11. See generally *supra* note 128.

<sup>134</sup> In fact, at least one commentator has suggested that "Model Rule 3.1 provides a more thoughtful and viable method of dealing with frivolous cases than either . . . Rule 11 or the state sanctions rules." Weston, *supra* note 32, at 924. It should be noted, however, that Model Rule 3.1 expressly exempts certain conduct by criminal defense attorneys that would be improper in the civil context, namely: "[a] lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established." MODEL RULES OF PROF'L CONDUCT R. 3.1 (2000), *reprinted in* MORGAN & ROTUNDA, *supra* note 1, at 61.

<sup>135</sup> Compare MODEL RULES OF PROF'L CONDUCT Rule 3.1 cmt. 2 (2000), *reprinted in* MORGAN & ROTUNDA, *supra* note 1, at 61, with FED. R. CIV. P. 11(b)(3).

<sup>136</sup> MODEL RULES OF PROF'L CONDUCT Rule 3.1 cmt. 2 (2000), *reprinted in* MORGAN & ROTUNDA, *supra* note 1, at 61.

purpose,” as well as those that suffer from an absence of factual or legal support.<sup>137</sup>

One notable textual distinction appears to be with regard to the standard for determining a violation.<sup>138</sup> While potential violations of Rule 11 are now judged by a purely objective standard of reasonableness “under the circumstances,”<sup>139</sup> Model Rule 3.1 speaks of “good faith,” which seems to connote subjectivity.<sup>140</sup> Despite this difference in the language of the two rules, Model Rule 3.1 has nevertheless been interpreted as providing for the same type of objective standard utilized in connection with a Rule 11 inquiry.<sup>141</sup>

Furthermore, as of the publication date of this article, the ABA’s Ethics 2000 Commission<sup>142</sup> had proposed revisions to Model Rule 3.1 and its comments,

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<sup>137</sup> See, e.g., Andrews, *First Amendment*, *supra* note 130, at 32 (noting that “to the extent that Model Rule 3.1 standard was meant to track the procedural law, it also could have a subjective ‘improper purpose’ component”). But see *infra* notes 147–51 and accompanying text.

<sup>138</sup> Another apparent distinction, which is not particularly significant for purposes of this article, is that Model Rule 3.1 does not seem to be limited strictly to “papers” as is Rule 11. Compare MODEL RULES OF PROF’L CONDUCT R. 3.1 (2000), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 61, with FED. R. CIV. P. 11(a); LAWYERS’ MANUAL, *supra* note 3, at 61:107 (noting examples of Model Rule 3.1 being construed to prohibit threats “to file or press frivolous claims”). It must be emphasized, however, that the 1993 version of Rule 11 now also applies to situations where an improper position is “later advocated” in the course of litigation, on paper or otherwise. See FED. R. CIV. P. 11(b) and advisory committee’s note to 1993 amendments (“[A] litigant’s obligations with respect to the contents of . . . papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit.”).

<sup>139</sup> FED. R. CIV. P. 11(b).

<sup>140</sup> The comments to Model Rule 3.1 seem to further support this apparent difference in standard. See *supra* text accompanying note 136; see also ROTUNDA, LEGAL ETHICS, *supra* note 3, at § 22-1.1 (noting that the standard, as described in the comments to Rule 3.1, “hardly appears to be objective”); Weston, *supra* note 32, at 923 (noting that Model Rule 3.1 apparently differs from Rule 11 with regard to the issue of intent).

<sup>141</sup> See MODEL RULES OF PROF’L CONDUCT R. 3.1, Model Code Comparison (2000), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 61 (“the test in Rule 3.1 is an objective test”); see also LAWYERS’ MANUAL, *supra* note 3, at 61:107 (noting that “[c]ases applying Rule 3.1 generally utilize an objective standard along the lines of the objective test mandated by Rule 11”); Grosberg, *supra* note 26, at 657 (noting that the “reasonable lawyer” standard is applicable under Model Rule 3.1); HAZARD & HODES, *supra* note 2, § 27.12, at 27-24 (noting that Model Rule 3.1 “adopts an objective as opposed to a subjective standard to judge the bona fides of pleadings and other court papers”).

<sup>142</sup> The thirteen member Commission’s official name is the “Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct,” but it is commonly referred to as simply “Ethics 2000.” This body has been charged with:

1) conducting a comprehensive study and evaluation of the ethical and professionalism precepts of the legal profession; 2) examining and evaluating the ABA

which, if adopted, will further emphasize the link between it and Rule 11. The single change to the text recommended by the Commission simply "makes explicit the requirement that a claim must have a nonfrivolous basis in both law and fact."<sup>143</sup>

A more significant change has been offered with respect to comment 2 of the rule. Here, the Commission has proposed the inclusion of a sentence that will highlight the fact that an attorney has a duty under Model Rule 3.1 to conduct a pre-filing investigation and will also clarify the scope of that responsibility. The prospective revision provides that: "What is required of lawyers . . . is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions."<sup>144</sup> In addition, although the amendment contains the phrase "good faith," the rule's reporter indicated that the purpose behind the proposed change is "to remind lawyers that they must act *reasonably* to inform themselves about the facts and law pertinent to a claim they will make on behalf of a client."<sup>145</sup> It therefore seems that a standard of objective reasonableness along the lines of that utilized under Rule 11 is more likely intended than a strict subjective measure.<sup>146</sup>

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Model Rules of Professional Conduct in the state and federal jurisdictions; 3) conducting original research, surveys and hearings; and 4) formulating recommendations for action.

ABA Center for Professional Responsibility, Mission Statement, at [http://www.abanet.org/cpr/e2k-mission\\_statement.html](http://www.abanet.org/cpr/e2k-mission_statement.html) (last visited July 25, 2001).

<sup>143</sup> Rule 3.1: *Meritorious Claims and Contentions*, Reporter's Explanation of Changes, in ABA ETHICS 2000 COMMISSION REPORT, available at <http://www.abanet.org/cpr/e2k-rule31rem.html> (visited June 13, 2001) [hereinafter ETHICS 2000 REPORT].

<sup>144</sup> *Id.* at cmt. 2. One might still contend that a violation of Rule 11's more explicit duty to conduct a reasonable pre-filing investigation would not also constitute a violation of Model Rule 3.1, even with the revised comment. This potential lack of overlap, however, should not be significant given that it seems highly unlikely that lawyers will be sanctioned under Rule 11 for failing to conduct a pre-filing inquiry with respect to a claim, defense, or contention that is objectively "non-frivolous." See, e.g., Carol Rice Andrews, *Jones v. Clinton: A Study in Politically Motivated Suits, Rule 11, and the First Amendment*, 2001 BYU L. REV. 1, 32-33 (2001) (discussing *In re Keegan Management Co.*, 78 F.3d 431 (9th Cir. 1996), in which the Ninth Circuit held that plaintiff, who failed to conduct a reasonable pre-filing inquiry, was not subject to Rule 11 sanctions for meritorious complaint) [hereinafter Andrews, *Study*]; cf. *infra* notes 149-51. But see, e.g., *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274 (3d Cir. 1994) (holding that lawyers who filed a "copycat" securities fraud lawsuit based only on: (1) a newspaper article; (2) review of the complaint that was copied; and (3) a conversation with the attorney who filed the original complaint, constituted a failure to conduct a reasonable pre-filing investigation and therefore violated Rule 11, notwithstanding the potential merit of the claims asserted). See generally GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES* §5.03(b)(1) (3d ed. forthcoming 2002).

<sup>145</sup> ETHICS 2000 REPORT, *supra* note 143, at Reporter's Explanation of Changes (emphasis added).

<sup>146</sup> See *supra* note 141 and accompanying text; see also ETHICS 2000 REPORT, *supra* note 143, at Reporter's Explanation of Changes (referring to the "objective merits" of a claim). But see 17 ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT: CURRENT REPORTS No. 12 349

The final proposed revision to Model Rule 3.1 would eliminate the comment that defines as “frivolous” an action undertaken at a client’s behest for the primary purpose of “harassing or maliciously injuring a person.”<sup>147</sup> The proffered explanation for this change is that “the client’s purpose is not relevant to the objective merits of the client’s claim.”<sup>148</sup> If adopted, this change would appear to be a departure from the “improper purpose” prong of the 1993 version of Rule 11. It is unlikely, however, that this would prove to be a significant distinction in terms of equating a Rule 11 violation with a Model Rule 3.1 violation. This is so because of the inevitability of a Rule 11 violation being founded solely on the basis of the filer possessing an improper purpose.<sup>149</sup> Logic suggests that if one has a valid legal and factual foundation for a claim, contention, or defense, one’s subjective motivation for asserting it will more than likely be irrelevant.<sup>150</sup> In

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(2001) (suggesting that rather than adopt a previously proposed “nonfrivolous” standard, the Commission “returned the rule to its present, subjective ‘good faith’ standard”) [hereinafter CURRENT REPORTS No. 12]; *supra* note 140.

<sup>147</sup> See *supra* note 136 and accompanying text (quoting comment 2 to Rule 3.1); ETHICS 2000 REPORT, *supra* note 143. For a discussion of a similar recommendation based on First Amendment concerns, see Andrews, *First Amendment*, *supra* note 130, at 75–76.

<sup>148</sup> ETHICS 2000 REPORT, *supra* note 143, at Reporter’s Explanation of Changes.

<sup>149</sup> See Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L.J. 665, 713 (2000) (observing that “[c]ases rarely present the improper purpose clause in isolation”) [hereinafter Andrews, *Motive Restrictions*]; see also Kruzansky, *supra* note 104, at 1385 (noting the somewhat pointless nature of the improper purpose prong and arguing for its elimination). But see Andrews, *Motive Restrictions*, *supra*, at 715–16 (discussing dicta in cases that suggests at least the possibility of sanctions for a complaint filed for an improper purpose and one case in which this was actually done); Kruzansky, *supra* note 104, at 1382–83 (acknowledging minority position espoused by the Seventh Circuit that “a claim filed for the improper purpose of needlessly increasing litigation costs should be penalized, whether the legal arguments contained within the claim are valid or not”) (citing *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987)). Cf. Andrews, *Study*, *supra* note 144, at 26 (noting that most courts that “refuse to sanction meritorious complaints . . . leave open the possibility of sanctions against litigants who file motions for improper purposes”).

<sup>150</sup> See Andrews, *Motive Restrictions*, *supra* note 149, at 714 (discussing jurisdictions that have interpreted Rule 11 as not permitting “sanctions for a plaintiff’s improper purpose if his complaint is otherwise meritorious”); Kruzansky, *supra* note 104, at 1378–79 (noting that the majority position is that “so long as the complaint itself is nonfrivolous, any suggestion of an improper purpose (such as harassment) must fail because, by definition, if a claim is colorable, a proper purpose exists for its being brought”); see also JOSEPH, *supra* note 30, §13(c), at 222 (noting that “while sanctions may be imposed for presenting a meritorious paper for an improper purpose, courts should be, and are, circumspect about doing so”); Andrews, *Study*, *supra* note 144, at 7 (generally arguing that so long as “underlying claims have some merit, courts must allow politically motivated lawsuits”). But see JOSEPH, *supra* note 30, §13(c), at 221 (contending that “[t]he prevailing, and better, view is that . . . [p]resenting a pleading, written motion or other paper for an improper purpose violates the Rule, even if the paper has ample evidentiary support and is warranted in law”); Andrews, *Study*, *supra* note 144, at 26

other words, the improper purpose prong of Rule 11 will typically only be implicated in conjunction with some other violation of the rule—i.e., lack of legal or factual merit.<sup>151</sup>

Thus, the only truly significant difference between the 1993 version of Rule 11 and Model Rule 3.1 in its present or proposed form is the absence of a safe harbor provision with respect to the latter.<sup>152</sup> Under Model Rule 3.1, once a violation has occurred, there is no mechanism whereby the offending attorney can undo or retract his or her misconduct in order to avoid possible discipline. That important distinction aside, the two rules are substantially the same.

Given the similarity between the content, purpose, and standard of the rules, it is effectively inconceivable that when there is a violation of one there not will likewise have been a violation of the other.<sup>153</sup> In addition, an offending attorney should be subject to sanctions under Model Rule 3.1 irrespective of whether or not he or she takes advantage of Rule 11's safe harbor provision.<sup>154</sup> Furthermore, besides violating Model Rule 3.1, it is also quite possible that the same conduct would subject an attorney to discipline under Model Rules 3.2 (duty to make reasonable efforts to expedite litigation), 3.4(c) (prohibition against knowingly disobeying the rules of a tribunal), and 8.4(d) (prohibition against engaging in conduct that is prejudicial to the administration of justice).<sup>155</sup> Nevertheless, the principal ethical violation would be with regard to Model Rule 3.1.

Accordingly, one might reasonably expect that there would be more recorded violations of Model Rule 3.1 than Rule 11, because the former governs lawyers in both state and federal court and lacks a "safe harbor." This, however, is not at all the case. While there is a plethora of reported decisions regarding Rule 11

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(observing apparent differences in treatment of complaints and motions under the improper purpose prong).

<sup>151</sup> Andrews, *Motive Restrictions*, *supra* note 149, at 713 (noting that "[m]ost cases in which the improper purpose clause is implicated also involve pleadings or motions that are factually or legally frivolous"); accord Andrews, *Study*, *supra* note 144, at 31; see also *id.* at 98–106 (suggesting that violation of the improper purpose prong, when accompanied by another violation of Rule 11, might properly be used as a basis for "penalty enhancement"). Furthermore, it currently appears that the improper purpose aspect of Model Rule 3.1 is present in most state codes of professional conduct, despite the ABA's reform efforts. See Andrews, *Motive Restrictions*, *supra* note 149, at 730, 733.

It should also be noted that a prior draft by the Ethics 2000 Commission of proposed changes to Model Rule 3.1 would have made the similarities to Rule 11 even more evident. See ETHICS 2000 COMMISSION, PROPOSED RULE 3.1—PUBLIC DISCUSSION DRAFT (Apr. 12, 2000). Nevertheless, the decision not to propose these changes fails to alter the fact that, as written and as actually proposed, there remains substantial overlap between Rule 11 and Model Rule 3.1.

<sup>152</sup> See *supra* text accompanying note 132.

<sup>153</sup> But see *supra* note 144.

<sup>154</sup> See *supra* text accompanying note 152.

<sup>155</sup> MODEL RULES OF PROF'L CONDUCT R. 3.2, 3.4(c), 8.4(d) (2000), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 62, 67, 106.

violations,<sup>156</sup> in any given jurisdiction there are few if any decisions disciplining attorneys for violation of Model Rule 3.1.<sup>157</sup>

It can be argued that to discipline an attorney under Model Rule 3.1 when that lawyer has already been sanctioned under Rule 11 would be duplicative or overkill.<sup>158</sup> Such arguments, however, are misguided insofar as they ignore the benefits associated with attorneys being subject to parallel discipline.<sup>159</sup> In particular, a separate ethical rule regarding frivolous filings, such as Model Rule 3.1, can “prevent repeat offenders from escaping notice, and build confidence in the legal system as a whole.”<sup>160</sup> In addition, in the event that litigation misconduct escapes a Rule 11 sanction because of the safe harbor provision or some other reason, enforcement of Model Rule 3.1<sup>161</sup> can ensure that such behavior does not go unpunished.<sup>162</sup>

Irrespective of the clear benefits to its parallel enforcement, Model Rule 3.1 remains rarely invoked, no matter what the circumstances.<sup>163</sup> There are various possible explanations for this apparent inefficacy—none of them good. Besides the perception that there are other procedural rules (e.g., Rule 11) that adequately address such conduct,<sup>164</sup> it is also possible that the standard of proof required to establish a violation of Model Rule 3.1 is considered too exacting to justify the

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<sup>156</sup> See, e.g., *supra* notes 40–41 and accompanying text.

<sup>157</sup> See *supra* note 129 and accompanying text; LAWYERS’ MANUAL, *supra* note 3, at 61:107 (observing that “[m]ost of the reported cases approving or imposing discipline under Rule 3.1 involve both unfounded litigation *and* some improper motive or wrongful intent”); WOLFRAM, *supra* note 1, § 11.2.2, at 595 (noting that discipline in this area appears limited to “moves in litigation that sometimes seem more psychopathic than nasty, that involve patently fraudulent schemes, or that arise in limited areas in which courts express a special concern for lawyer forthrightness”); cf. McMorrow, *supra* note 26, at 974 & n.82 (noting that few reported decisions have construed Model Rule 3.1).

<sup>158</sup> See HAZARD & HODES, *supra* note 2, § 27.12, at 27-25 (noting that some may ask “whether a parallel rule of discipline is needed”); cf. RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS § 110 cmt. b (2000) (noting that “[m]ost bar disciplinary agencies rely on the courts in which litigation occurs to deal with abuse”). But see Jeffrey A. Parness, *Enforcing Professional Norms for Federal Litigation Conduct: Achieving Reciprocal Cooperation*, 60 ALB. L. REV. 303 (1996) (discussing the need for reciprocity and cooperation between state and federal disciplinary authorities and federal courts with regard to litigation misconduct) [hereinafter Parness, *Enforcing*].

<sup>159</sup> See, e.g., HAZARD & HODES, *supra* note 2, § 27.12, at 27-25 (noting that at least one rationale for having a parallel rule of discipline is to “prevent repeat offenders from escaping notice”); see also WOLFRAM, *supra* note 1, § 3.5.2, at 122 (observing that “[k]nown repetition [of misconduct] clearly implies incorrigibility”). See generally Parness, *Enforcing*, *supra* note 158.

<sup>160</sup> HAZARD & HODES, *supra* note 2, § 27.12, at 27-25.

<sup>161</sup> Either alone or in combination with other Model Rule provisions, such as Rule 3.2, 3.4(c), and 8.4(d). See *supra* note 155 and accompanying text.

<sup>162</sup> See *infra* notes 268–76 and accompanying text.

<sup>163</sup> See *supra* notes 129, 157 and accompanying text.

<sup>164</sup> See RESTATEMENT OF THE LAW: THE LAW GOVERNING LAWYERS § 110 cmt. c (2000).

necessary effort.<sup>165</sup> Specifically, in order to determine whether or not the rule has been violated under the applicable objective standard, "either expert testimony is required or [the tribunal] must resolve the issue as a question of law."<sup>166</sup> Counsel may simply not want to expend the necessary effort. In addition, disturbing as it might seem, there may be a general lack of awareness amongst members of the bar of the very existence of the rule.<sup>167</sup> An even more troubling explanation is the possibility that lawyers view Model Rule 3.1 as purely hortatory in nature, along the lines of the Canons of Professional Ethics.<sup>168</sup>

However, the most likely reason for the lack of enforcement with regard to Model Rule 3.1 is the perception within the profession that such conduct is really not that bad. Put simply, lawyers undoubtedly consider much litigation misconduct annoying, frustrating and maybe even harassing, but not technically "unethical."<sup>169</sup> Hence, they feel no obligation to report such professional transgressions as required by Model Rule 8.3(a).<sup>170</sup> These attorneys may seek sanctions against the offending attorney under Rule 11, if possible; however, if the misbehaving attorney takes refuge in the safe harbor provision, the odds are that his or her litigation misconduct will go unpunished and undeterred, no matter how egregious.

Indeed, one recent draft of Rule 1 of the proposed Uniform Federal Rules of Attorney Conduct, if adopted, would appear to insulate completely all safe harbor inhabitants, no matter how unseemly, from any sort of discipline.<sup>171</sup> The relevant portion of this draft of the rule essentially prohibits the imposition of any state

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<sup>165</sup> See HAZARD ET AL., *supra* note 129, at 386.

<sup>166</sup> *Id.*

<sup>167</sup> See, e.g., Abel, *supra* note 1, at 646 (suggesting that pre-admission ethics requirements may "elicit[ ] no more than rote memorization and rapid amnesia"). Furthermore, lawyers who are aware of Model Rule 3.1 may incorrectly perceive that the standard for a violation is greater than for a violation of Rule 11. See, e.g., CURRENT REPORTS NO. 12, *supra* note 146, at 349. But see *supra* note 141 and accompanying text.

<sup>168</sup> See *supra* notes 2, 27.

<sup>169</sup> See *supra* notes 10–12 and accompanying text; see also *supra* note 113.

<sup>170</sup> MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2000), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 105. For a detailed discussion of Model Rule 8.3(a) and why a violation of Model Rule 3.1 triggers the reporting obligation, see *infra* Part III.

<sup>171</sup> See FEDERAL RULES OF ATTORNEY CONDUCT, Draft Rule 1, reprinted in 16 ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT: CURRENT REPORTS NO. 6 158 (2000) [hereinafter CURRENT REPORTS NO. 6]. For a discussion of the need for the establishment of a uniform federal system for regulating litigation conduct in federal courts, see Stephen B. Burbank, *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 FORDHAM URB. L.J. 969 (1992). See also Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created?*, 64 GEO. WASH. L. REV. 460 (1996); Katherine M. Lasher, Comment, *A Call for a Uniform Standard of Professional Responsibility in the Federal Court System: Is Regulation of Recalcitrant Attorneys at the District Court Level Effective?*, 66 U. CIN. L. REV. 901 (1998). But see Note, *Uniform Federal Rules of Attorney Conduct: A Flawed Proposal*, 111 HARV. L. REV. 2063 (1998).



sanction for conduct that is consistent with “the requirements or opportunities of federal procedure.”<sup>172</sup> Accordingly, under this rule (assuming that it is adopted and enforceable), if an attorney withdraws a frivolous position pursuant to Rule 11’s safe harbor provision, he or she will subsequently be protected from any possible state disciplinary action.<sup>173</sup> Such a rule would solidify the desuetude of Model Rule 3.1 and further encourage the existing tolerance and legitimation of inappropriate advocacy within the legal system.<sup>174</sup>

Given the ethical blackhole created by the Rule 11 safe harbor provision (alone, and particularly in conjunction with the proposed uniform federal rule, if enacted), there exists the potential for a large body of “unethical filers” about whom the profession will complain, but who nevertheless will be permitted to continue their careless, incompetent, or ill-intentioned litigation practices unabated. The solution to this problem is not to amend Rule 11 or to enact some new sanctioning or disciplinary provision. Rather, as discussed in Part IV, the

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<sup>172</sup> *Federal Judges Study New Option for Uniform Rule on Attorney Conduct*, CURRENT REPORTS NO. 6, *supra* note 171, at 155. The pertinent portions of the draft rule provide as follows:

(c) Procedure. Federal law governs all matters of procedure in the United States District Courts and Courts of Appeals [, [sic] whether addressed by the Federal Rules of Attorney Conduct, Appellate Procedure, Bankruptcy Procedure, Civil Procedure, Criminal Procedure, or Evidence; by judicially developed rules; by local court rules; or by the court in its inherent power]. The court may, after notice and opportunity to be heard, enforce the procedural rules and its orders by all appropriate sanctions, including forfeiture of fees, reprimand, censure, or suspension or revocation of the privilege to appear before the court.

....

(e) State Sanctions Preempted. No state authority may impose any sanction, civil liability, or other consequence on an attorney for conduct in connection with an action or proceeding in a United States District Court or Court of Appeals if the conduct is authorized by order of the United States court or by the federal law of procedure that applies under Rule 1(c).

FEDERAL RULES OF ATTORNEY CONDUCT, Draft Rule 1(c), (e), *reprinted in* CURRENT REPORTS NO. 6, *supra* note 171, at 158. It should be noted, however, that other alternative drafts of the proposed rule would not have as broad of a preemptive effect on state remedies available for litigation misconduct. *See id.* at 158–59.

It may also be possible to read the proposed Uniform Federal Rule more narrowly to encompass only conduct that is somehow expressly authorized by the federal law of procedure. One could argue that the safe harbor provision does not authorize the conduct prohibited by Model Rule 3.1; it simply allows one to correct or withdraw the wrongful paper and thereby avoid a federal sanction. The broader reading suggested in the text accompanying this note and *infra* note 173 nevertheless appears to be an equally if not more plausible reading and therefore, creates a concern with regard to the viability of Model Rule 3.1.

<sup>173</sup> *But see supra* note 62; *see also* Parness, *Enforcing*, *supra* note 158 (discussing need for reciprocal cooperation between federal courts and state disciplinary bodies).

<sup>174</sup> *But see supra* note 172.

most viable and logical course of action is to emphasize, reinvigorate, and simplify the ethical duty to report.<sup>175</sup>

### III. MODEL RULE OF PROFESSIONAL CONDUCT 8.3

#### A. *The History and Origin of the Duty to Report*

As members of an almost exclusively self-regulating and self-policing profession,<sup>176</sup> lawyers have traditionally been required, or at least strongly urged, to report the ethical misconduct of other attorneys to the appropriate disciplinary authorities. Indeed, the ABA's first foray into the codification of lawyer ethics, the 1908 Canons of Professional Ethics,<sup>177</sup> contained the following aspirational directive:

Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client . . . He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but also the administration of justice.<sup>178</sup>

As the language of this Canon clearly reveals, lawyers were encouraged to report certain misconduct of other attorneys and strive to maintain the dignity of the profession, but such paternalistic behavior was not mandated.<sup>179</sup>

The discretionary nature of the duty to report, however, changed with the ABA's adoption of the Model Code of Professional Responsibility in 1969.<sup>180</sup> Under DR 1-103(A) of the Model Code, "[a] lawyer possessing unprivileged knowledge of a violation of DR 1-102 *shall report* such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."<sup>181</sup> This

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<sup>175</sup> See *infra* Part IV.

<sup>176</sup> See *supra* notes 1, 4 and accompanying text.

<sup>177</sup> See *supra* notes 2, 27.

<sup>178</sup> CANONS OF PROF'L ETHICS Canon 29 (1908), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 809. For a comprehensive discussion of the development and current state of the duty to report, see Richmond, *supra* note 6.

<sup>179</sup> See Richmond, *supra* note 6, at 177; Rotunda, *supra* note 8, at 979; Burwick, *supra* note 5, at 139; Eastin, *supra* note 5, at 1273; see also note 27 (discussing the somewhat tainted origin and purpose of the Canons).

<sup>180</sup> See Richmond, *supra* note 6, at 178 (noting that "DR 1-103(A) created a mandatory requirement out of what was previously discretionary"); Rotunda, *supra* note 8, at 981 (observing that "the Model Code made clear that [the] duty to report [was] not an aspirational one but one of discipline"); Burwick, *supra* note 5, at 140 (noting the "transformation of the disclosure requirement from permissive to mandatory"); see also *supra* note 2.

<sup>181</sup> MODEL CODE OF PROF'L RESPONSIBILITY DR 1-103(A) (1981), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 170 (emphasis added).

provision was extremely far-reaching in its mandate insofar as it appeared to require lawyers to report every potential ethical infraction by other attorneys, no matter how trivial.<sup>182</sup> Specifically, DR 1-102, a violation of which triggered the duty to report, defined "misconduct" for purposes of the Model Code and included, among other things: (1) the violation of a disciplinary rule and (2) conduct that adversely reflected on an attorney's fitness to practice law.<sup>183</sup> In light of this very broad definition of "misconduct," a lawyer was arguably duty bound to report even the most minor professional lapses.<sup>184</sup>

More significantly, the failure of an attorney to report any such minor misconduct of which he or she possessed unprivileged knowledge should, at least theoretically, result in the imposition of discipline on the non-reporting attorney.<sup>185</sup> Though failing to report even serious misconduct has rarely served as

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<sup>182</sup> See Richmond, *supra* note 6, at 178 (observing that DR 1-103(A) appeared to require lawyers "to report even innocent and trivial ethical lapses by colleagues and friends"); Rotunda, *supra* note 8, at 981 (noting "the breadth of the reporting obligation"). But see Lynch, *supra* note 6, at 506 (noting the ambiguities inherent in DR 1-103(A) undermine the power of the obligation).

<sup>183</sup> See MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A) (1981), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 169-70; see also Richmond, *supra* note 6, at 178. The actual text of DR 1-102 read as follows:

(A) A lawyer shall not:

- (1) Violate a Disciplinary Rule.
- (2) Circumvent a Disciplinary Rule through actions of another.
- (3) Engage in illegal conduct involving moral turpitude.
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.
- (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A) (1981), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 169-70. The non-binding Ethical Consideration that accompanied this rule suggested an even more exacting standard with regard to the duty to report:

The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules.

MODEL CODE OF PROF'L RESPONSIBILITY EC 1-4 (1981), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 168.

<sup>184</sup> See Richmond, *supra* note 6, at 178; Rotunda, *supra* note 8, at 981.

<sup>185</sup> See Richmond, *supra* note 6, at 178 (observing that under DR 1-103(A) "a lawyer who knew of attorney misconduct and who failed to report it...could...be held personally

the sole basis for disciplining a lawyer,<sup>186</sup> the celebrated case of *In re Himmel*<sup>187</sup> was an ominous exception.<sup>188</sup> In this Illinois discipline case, attorney James Himmel was suspended from practice for one year as a result of his failure to report certain egregious misconduct perpetrated by attorney John Casey.<sup>189</sup>

Specifically, Casey represented Tammy Forsberg in a personal injury action on a contingency fee basis.<sup>190</sup> The case was settled, but Casey failed and refused to disburse Forsberg's two-thirds of the settlement proceeds to her.<sup>191</sup> Forsberg subsequently retained Himmel to assist her in recovering her funds.<sup>192</sup> Although Himmel clearly possessed knowledge of Casey's misconduct of basically stealing from Forsberg, Himmel contended that such knowledge was privileged because it was gleaned from his client, and therefore, not reportable.<sup>193</sup> The Illinois Supreme Court disagreed, narrowly construing the word "unprivileged" in Illinois's version of DR 1-103(A)<sup>194</sup> to refer only to communications not protected by the attorney-client privilege.<sup>195</sup> In addition, the court seemed especially troubled by the fact that a condition of the settlement, which Himmel negotiated with Casey on behalf

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responsible for violating the Disciplinary Rules"); Rotunda, *supra* note 8, at 981 (noting that DR 1-103(A) was a rule of "discipline").

<sup>186</sup> See Michael G. Daigneault, *Am I My Brother's Keeper*, FED. LAW. June 1996, at 9, 12; Richmond, *supra* note 6, at 179, 183; Burwick, *supra* note 5, at 146. *But cf.* Richmond, *supra* note 6, at 179 (noting greater number of discipline cases involving duty to report when there was also other serious misconduct committed by the recalcitrant lawyer).

<sup>187</sup> 533 N.E.2d 790 (Ill. 1988); *see also* Skolnick v. Altheimer & Gray, 730 N.E.2d 4, 13 (Ill. 2000) (reaffirming the principle that the duty to report attorney misconduct in Illinois is absolute).

<sup>188</sup> For thoughtful analyses of *In re Himmel* and its implications, see Richmond, *supra* note 6, at 179-83; Rotunda, *supra* note 8, at 982-97; *see also* Richmond, *supra* note 6, at 183 (noting that there is only one other reported instance in which an attorney was disciplined solely for failing to report—an unpublished Arizona Supreme Court decision, *In re Condit*, No. SB-94-0021-D (Ariz. Mar. 14, 1995)); Hussey, *supra* note 5, at 267.

<sup>189</sup> *Himmel*, 533 N.E.2d at 796.

<sup>190</sup> Casey apparently had a standard one-third contingency fee arrangement with Forsberg. *Id.* at 791.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* Notably, Himmel's fee arrangement with Forsberg only entitled him to one-third of any funds that he was able to recover from Casey in excess of the \$23,233.34 owed to Forsberg. *Id.*

<sup>193</sup> *See id.* at 794. Himmel also relied upon the fact that Forsberg had already reported Casey to the disciplinary authorities and that Forsberg had expressly forbidden him to report Casey. *Id.* at 792-94. The court held that neither fact relieved Himmel of his ethical obligation to report Casey. *See id.*

<sup>194</sup> The Illinois version of DR 1-103(A) differed from the Model Code version in that it limited the duty to report to acts constituting "illegal conduct involving moral turpitude" or "conduct involving dishonesty, fraud, deceit, or misrepresentation." *Id.* at 793.

<sup>195</sup> *Id.* at 794. The court specifically held that the record did "not suggest that [the pertinent] information was communicated by Forsberg to [Himmel] in confidence." *Id.*; *see also* Rotunda, *supra* note 8, at 986-89.

of Forsberg, was that no disciplinary referral would be made.<sup>196</sup> The court's decision was surprisingly severe and served, albeit temporarily, to heighten awareness of this important ethical obligation.<sup>197</sup>

As noted, however, the *Himmel* decision represents one of the very few attempts to strengthen and emphasize the duty to report.<sup>198</sup> The norm under DR 1-103(A) appears to have been non-reporting and non-enforcement of the failure to report.<sup>199</sup> The ambiguity of the rule, as well as its apparent overbreadth, among other things,<sup>200</sup> resulted in the ABA significantly modifying the duty to report again in 1983 in connection with its adoption of the Model Rules of Professional Conduct.<sup>201</sup> The pertinent portion of the new reporting provision (Model Rule 8.3) directed that:

A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.<sup>202</sup>

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<sup>196</sup> *Himmel*, 533 N.E.2d at 796 ("We are particularly disturbed by the fact that [Himmel] chose to draft a settlement agreement with Casey rather than report his misconduct . . . Both [Himmel] and his client stood to gain financially by agreeing not to prosecute or report Casey for conversion."); accord ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-383 (1994) (finding that a threat to file a disciplinary complaint against opposing counsel "may not be used as a bargaining point when the subject misconduct raises a substantial question as to [the] opposing counsel's honesty, trustworthiness or fitness as a lawyer").

<sup>197</sup> See Richmond, *supra* note 6, at 179, 182 (observing that *In re Himmel* "stunned the Bar" and noting subsequent increase in attorney reporting in Illinois); Rotunda, *supra* note 8, at 991 (noting that the *Himmel* decision was "a dramatic surprise to the bar"); Burwick, *supra* note 5, at 146 (acknowledging claims that there was a marked increase in attorney reporting of misconduct following *Himmel*); Hussey, *supra* note 5, at 266 (observing that "*Himmel* sent shockwaves throughout the legal community").

<sup>198</sup> See *supra* notes 184, 188.

<sup>199</sup> See *supra* notes 184, 188; see also *infra* note 201.

<sup>200</sup> For a discussion of the various problems contributing to the inefficacy of the duty to report under DR 1-103(A), see Lynch, *supra* note 6. See also *supra* note 9.

<sup>201</sup> See Richmond, *supra* note 6, at 178 (noting that Model Rule 8.3(a) was intended "to be simpler and more enforceable than its predecessor"); Burwick, *supra* note 5, at 141 & n.21 (noting Professor Geoffrey C. Hazard, Jr.'s observation that "the reporting requirement had been narrowed because the Model Code provision had proved unenforceable in practice").

<sup>202</sup> MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2000), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 105. As with DR 1-103(A), Model Rule 8.3 likewise contains an exception for situations in which an attorney obtains his or her "knowledge" of an ethical violation through a privileged communication. See *id.* Rule 8.3(c). The exception, however, is on its face broader than that contained in DR 1-103(A), as Rule 8.3(c) "does not require disclosure of information otherwise protected by Rule 1.6 . . ." See *id.*; see also Richmond, *supra* note 6, at 182, 195-99. Model Rule 1.6 generally protects from disclosure all "information relating to the representation of a client . . ." MODEL RULES OF PROF'L CONDUCT R. 1.6 (2000), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 18. For a discussion of the

This rule was intended to define more clearly and narrowly the circumstances under which an attorney is obligated to report the misconduct of a fellow member of the bar.<sup>203</sup> Specifically, the reporting requirement is only triggered when there has essentially been a serious violation of the Model Rules,<sup>204</sup> thus avoiding DR 1-103(A)'s flaw of including too much. Indeed, the comments to Model Rule 8.3 directly expound upon this point, noting that:

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. The Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent . . . .<sup>205</sup>

At present, with a few exceptions, all jurisdictions have an ethical rule that mandates or strongly encourages lawyers to report the ethical misconduct of other attorneys,<sup>206</sup> and the vast majority of those jurisdictions have adopted some form of Model Rule 8.3.<sup>207</sup> Given the increased specificity of the new reporting rule, one might logically expect some alteration in the reporting habits of attorneys. As the next section indicates, however, little has changed with the advent of Model Rule 8.3.

### *B. The Reasons for and Effects of the Norm of Silence*

Although Model Rule 8.3 is seemingly an improvement over DR 1-103(A), it has apparently been no more successful in reversing the legal profession's general norm of silence in regard to reporting the ethical offenses of other attorneys.<sup>208</sup> There are many potential explanations for this continuing phenomenon.<sup>209</sup>

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potential problems created by the broadness of this exception, see *infra* Part III.B. See also Richmond, *supra* note 6, at 197–99 (describing, in essence, how the confidentiality exception to Model Rule 8.3 may effectively swallow the rule); Rotunda, *supra* note 8, at 986–89 (discussing the effect of the Illinois Supreme Court's narrow interpretation of "unprivileged" in *In re Himmel*).

<sup>203</sup> See *supra* note 201.

<sup>204</sup> See MODEL RULES OF PROF'L CONDUCT R. 8.3, cmt. 3 (2000), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 105–06 ("The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware."); see also Lynch, *supra* note 6, at 513 (noting that the "misconduct [must] be serious before any obligation to inform arises"); Richmond, *supra* note 6, at 189 (noting that "[o]nly the most serious ethics violations must be reported").

<sup>205</sup> See MODEL RULES OF PROF'L CONDUCT R. 8.3 cmt. 3 (2000), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 104.

<sup>206</sup> See *supra* note 5.

<sup>207</sup> *Id.*

<sup>208</sup> As Professor Gerard Lynch has noted:

First, the language of Model Rule 8.3(a) itself, though arguably more precise than DR 1-103(A), suffers from many of the same ambiguities as its Model Code predecessor. Under Rule 8.3, a lawyer is only required to inform with respect to serious misconduct of which he or she has "knowledge."<sup>210</sup> It is unclear, however, what precise level of knowledge is necessary to trigger the obligation to report.<sup>211</sup> Does an attorney need actual knowledge, reasonable suspicion, or something else?<sup>212</sup> Furthermore, given the ever-questioning nature of lawyers, many likely find it difficult to conclude that they possess true knowledge of anything.<sup>213</sup>

The language of Model Rule 8.3 poses similar interpretive difficulties in connection with determining what type of misconduct constitutes a reportable offense.<sup>214</sup> The rule indicates that such offenses are those ethical violations that "raise[] a substantial question as to [a] lawyer's honesty, trustworthiness, or

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Although the Model Rules have moved in the right direction by limiting the obligation to inform to situations in which the violation is serious, they have not carefully defined the categories of information subject to the mandatory reporting obligation. Instead, the Model Rules create an obligation that imports into the old rule yet another ambiguous exercise of judgment.

Lynch, *supra* note 6, at 535-36.

<sup>209</sup> See *supra* notes 10-12 and accompanying text (discussing reasons for non-reporting of litigation misconduct). See generally *supra* note 9.

<sup>210</sup> See MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2000), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 105.

<sup>211</sup> See Richmond, *supra* note 6, at 185. The "Terminology" section of the Model Rules essentially defines "knowledge" in the following manner: "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." MODEL RULES OF PROF'L CONDUCT Terminology (2000), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 7. This definition, however, is somewhat circular and fails to give attorneys any meaningful guidance. See generally Lynch, *supra* note 6, at 506-15.

<sup>212</sup> See Richmond, *supra* note 6, at 185-86 (pondering the level of certainty necessary to constitute "knowledge" for purposes of Model Rule 8.3(a)). Although the "substantial basis" test appears to be the "majority" approach with regard to determining the requisite level of knowledge, even that test leaves much room for uncertainty. See *id.* at 186 (noting that the substantial basis test "requires the reporting lawyer's clear belief or actual knowledge of misconduct based on pertinent facts," determined from an objective standard); see also ANNOTATED MODEL RULES, *supra* note 130, at 577 (noting that "[a]lthough absolute certainty is not required . . . , the lawyer's knowledge of another lawyer's unethical conduct must amount to 'more than a mere suspicion'" (citation omitted); Daigneault, *supra* note 186, at 10 (contending that "the 'knowledge' required must be more than mere suspicion or rumor and must be actual, but need not be absolutely certain").

<sup>213</sup> See James E. Mitchem, *The Lawyer's Duty to Report Ethical Violations*, 18 COLO. LAW. 1915, 1916 (1989) (observing that "[e]very lawyer who has been faced with surprise evidence at trial develops a healthy skepticism as to whether he or she truly has knowledge of any matter").

<sup>214</sup> See Richmond, *supra* note 6, at 189 (noting that "even the narrow reporting requirement in Model Rule 8.3(a) is somewhat nebulous").

fitness as a lawyer in other respects.”<sup>215</sup> Besides being deceptively broad, it cannot seriously be disputed that reasonable attorneys could disagree as to what types of violations fall within the rule’s definition,<sup>216</sup> though there are no doubt degrees of serious misconduct about which no rational minds may differ.<sup>217</sup> Consequently, ambiguities in the text of the rule itself likely contribute to the bar’s non-reporting ethic.

Another contributing factor stemming from Model Rule 8.3’s language relates to its apparent precision rather than its ambiguity. Rule 8.3(c) very specifically exempts from the reporting requirement “information otherwise protected by Rule 1.6,”<sup>218</sup> which broadly defines the duty of confidentiality owed by lawyers to their clients.<sup>219</sup> In particular, Model Rule 1.6 provides in pertinent part that “[a] lawyer shall not reveal *information relating to representation of a client* unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).”<sup>220</sup>

It is of course highly probable that any “knowledge” that an attorney obtains regarding the serious misconduct of another lawyer will emanate from “information relating to representation of a client.”<sup>221</sup> Thus, unless the client consents<sup>222</sup> or unless some other exception applies,<sup>223</sup> a large segment of

<sup>215</sup> MODEL RULES OF PROF’L CONDUCT R. 8.3(a) (2000), *reprinted in* MORGAN & ROTUNDA, *supra* note 1, at 105.

<sup>216</sup> *But see* Richmond, *supra* note 6, at 189 (contending that “[m]atters of opinion or judgment upon which competent lawyers might disagree ordinarily do not involve the kind of misconduct about which a report must be made”).

<sup>217</sup> *See, e.g., id.* at 190–91 (noting that criminal acts and misuse of client funds are examples of misconduct that typically triggers the duty to report).

<sup>218</sup> MODEL RULES OF PROF’L CONDUCT R. 8.3(c) (2000), *reprinted in* MORGAN & ROTUNDA, *supra* note 1, at 105.

<sup>219</sup> *See supra* note 202.

<sup>220</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2000), *reprinted in* MORGAN & ROTUNDA, *supra* note 1, at 18 (emphasis added). Subsection (b) of Rule 1.6 permits an attorney to disclose confidential information to the extent reasonably necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.

*Id.* at R. 1.6(b).

<sup>221</sup> *Id.* at R. 1.6(a).

<sup>222</sup> A lawyer should certainly endeavor to obtain his or her client’s consent in order to report serious ethical violations otherwise protected by the duty of confidentiality. *See* MODEL RULES OF PROF’L CONDUCT R. 8.3 cmt. 2 (2000), *reprinted in* MORGAN & ROTUNDA, *supra* note 1, at 105 (noting that “a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client’s interests”); Richmond, *supra* note 6,



reportable offenses likely go unreported with the textual blessing of Model Rule 8.3.<sup>224</sup> In other words, Model Rules 8.3 and 1.6 do not simply facilitate the norm of silence, they actually impose it in many circumstances.<sup>225</sup>

Some more simplistic, though nonetheless significant, reasons that may explain attorneys' reluctance to report ethical violations are fear of retaliation and concern about being perceived as "tattletales."<sup>226</sup> Indeed, there is a tendency within society to glorify those who remain silent despite the risk of personal peril.<sup>227</sup> In addition, certain practical factors may also contribute to the lack of reporting. Namely, it takes effort to report another lawyer—the reporting lawyer must usually prepare and submit a written description of his or her accusations to the appropriate authorities and may subsequently be called upon to participate in some fashion in the actual disciplinary process. Put simply, informing can be somewhat of an involved undertaking. Therefore, to avoid the hassle, many lawyers choose to ignore the obligation altogether, particularly given the perception that a reported attorney is ultimately unlikely to receive serious discipline, if any.<sup>228</sup> It is also possible that lawyers are not sufficiently familiar with their reporting obligation to recognize when the duty arises or else simply do not take this responsibility seriously.<sup>229</sup>

The most troubling explanation, though, particularly among litigators, may be a general numbness within the bar to unethical behavior. However, such indifference to wrongful conduct is by no means indigenous to the legal profession. Surely, not a day goes by without complaints from the citizenry about the unseemly state of politics in America, or without individuals lamenting that they could never aspire to elected office because of the overly-intrusive and

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at 201 (contending that "[b]ecause effective self-regulation is critical to the legal profession . . . , a lawyer should encourage a client to consent to disclosure so that the lawyer may report the misconduct"). Such consent, however, may be difficult to obtain given that in many instances it may be detrimental to the client's cause to antagonize the adversary by squealing on opposing counsel. *Cf. infra* note 231.

<sup>223</sup> See *supra* note 220.

<sup>224</sup> See Richmond, *supra* note 6, at 197 (noting that the "duty of confidentiality incorporated in Rule 8.3(a) supercedes a lawyer's obligation to report another attorney's serious professional misconduct"); see also *supra* note 202.

<sup>225</sup> See Richmond, *supra* note 6, at 199 (observing that "[t]he lip-sealing nature of Rule 1.6(a) may preclude the legal profession from regulating itself effectively").

<sup>226</sup> See *supra* note 9.

<sup>227</sup> See, e.g., SCENT OF A WOMAN (Universal Pictures 1993) (motion picture in which the hero was a student at a private boarding school who risked expulsion rather than "squeal" on his classmates); see also Lynch, *supra* note 6, at 491 (noting society's "ambivalen[ce] toward those who report the wrongdoing of others").

<sup>228</sup> See, e.g., RHODE, *supra* note 8, at 70; see also HAZARD ET AL., *supra* note 129, at 915–16 (citing statistics that indicate the relatively small number of disciplinary complaints that actually result in any sort of discipline—and even fewer that result in serious discipline).

<sup>229</sup> See *supra* note 9.

generally corrupt nature of the process. Yet, these armchair complainers typically accept the state of affairs as a given—politics as usual.

Like with politics, many within the legal profession have grown accustomed to the unpleasanties that all too often accompany the litigation process. Attorneys complain about it,<sup>230</sup> but by and large they do not act on those complaints. Instead, they seem to accept, or at least tolerate, the “bad stuff” as a component of the adversary system.<sup>231</sup> Consequently, attorneys almost never report other lawyers for litigation conduct that amounts to unethical behavior.<sup>232</sup> Even worse, there are rules and remedies parallel to the disciplinary process, such as Rule 11, that give legal imprimatur to the norm of silence.

### *C. The Logical Inconsistency Between the Safe Harbor Provision and the Duty to Report*

As discussed previously, the safe harbor provision of Rule 11 effectively creates a protective zone of silence around attorneys who assert frivolous claims or positions. No matter how egregious or frequent the misconduct, these “frivolous filers” can avoid Rule 11 sanctions by simply withdrawing or dismissing the claim or position pursuant to the safe harbor provision.<sup>233</sup>

Although Rule 11 protects lawyers only from sanctions within federal trial courts, it has the effect of creating a much broader zone of protection because there is an undeniable link between Rule 11 and Model Rule 3.1.<sup>234</sup> When there has been a violation of Rule 11, there will almost certainly have been a violation of Model Rule 3.1, as well as Model Rules 3.2, 3.4(c), and 8.4(d), irrespective of whether or not Rule 11 sanctions are ultimately imposed.<sup>235</sup> Specifically, at the moment when an attorney determines that there has been a violation of Rule 11

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<sup>230</sup> See *supra* note 11.

<sup>231</sup> One commentator has insightfully observed that:

In the course of contending with the zealous representation of the interests of adverse parties, the conduct of opposing counsel may be viewed by a lawyer as merely an obstacle to be overcome. A lawyer is not seeking to catch others in ethical violations. When the objectives of a client are either achieved or defeated, the lawyer goes on to other cases, perhaps not realizing that he or she has acquired knowledge of an ethical violation.

Mitchem, *supra* note 213, at 1917; cf. William L. Hutton, Note, *The Lawyer's Duty to Report Another Lawyer's Misconduct*—In re Himmel, 14 S. ILL. U. L.J. 683, 689 (noting that “[s]ome attorneys erroneously may believe that the duty to report requires [them] to act against the best interests of their clients and could constitute a failure to represent those clients zealously”).

<sup>232</sup> This obviously seems to be the case at least with respect to the assertion of frivolous claims or positions, given that Model Rule 3.1 is rarely a source of discipline. See *supra* notes 129, 157. In federal court, non-reporting in this area is virtually guaranteed by the safe harbor provision of Rule 11. See *infra* Part III.C.

<sup>233</sup> See *supra* Part II.B.

<sup>234</sup> See *supra* Part II.C.

<sup>235</sup> See *supra* notes 132–55 and accompanying text.

and decides to prepare and serve the requisite “notice” motion<sup>236</sup> on opposing counsel, that lawyer will also necessarily have determined that there was a violation of Model Rule 3.1, among others, as well.<sup>237</sup> Moreover, it goes without saying that such a determination meets the “knowledge” requirement of Model Rule 8.3(a) no matter what level of knowledge is deemed appropriate.<sup>238</sup> Thus, the duty to report is activated.<sup>239</sup>

Odds are, however, that no such reporting will occur. In fact, non-reporting is virtually guaranteed if the offending attorney takes refuge under the safe harbor provision. Why? Because if a lawyer is successful in convincing opposing counsel to withdraw or dismiss a frivolous claim or position, that lawyer has achieved a victory of sorts, akin to prevailing on summary judgment or on a motion to dismiss.<sup>240</sup> Why would he or she expend further time and effort reporting the other attorney? Indeed, such reporting could likely create additional antagonism in the litigation, which might hamper the reporting lawyer’s ability to attain the optimal result for his or her client.<sup>241</sup> Consequently, like Model Rule 8.3’s confidentiality exception,<sup>242</sup> the safe harbor provision also has a “lip-sealing” impact on attorneys’ reporting obligations.<sup>243</sup> In effect, the safe harbor provision encourages the very conduct about which the Illinois Supreme Court

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<sup>236</sup> See *supra* note 59 and accompanying text.

<sup>237</sup> See *supra* notes 132–55 and accompanying text.

<sup>238</sup> Although it is somewhat unclear exactly what level of knowledge is required under Model Rule 8.3(a), it seems only logical that if an attorney feels strongly enough about a potential Rule 11 violation to be willing to go through the effort of preparing and serving a formal motion, that attorney surely possesses more than enough knowledge of a Model Rule 3.1 violation to trigger the duty to report. See *supra* note 212 and accompanying text; see also *infra* note 269.

<sup>239</sup> See Parness, *Disciplinary Referrals*, *supra* note 24, at 61 (noting that “even when frivolous papers are removed during the safe harbor period, their presentment by lawyers should be reported to state disciplinary agencies when *substantial* questions are raised about the lawyers’ honesty, trustworthiness, or fitness”) (emphasis added). Rather than weighing whether a Rule 11/Model Rule 3.1 violation is “substantial” enough, it seems appropriate to simply acknowledge that any such violation necessarily “raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” MODEL RULES OF PROF’L CONDUCT R. 8.3(a) (2000), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 105; see also Lynch, *supra* note 6, at 540 (observing that “actions that obstruct judicial processes violate the very essence of the lawyer’s role in the administration of justice”); Richmond, *supra* note 6, at 193 (noting that “[a] lawyer who engages in conduct ‘prejudicial to the administration of justice’ under Model Rule 8.4(d) arguably is unfit to practice law”); see also *supra* note 155 and accompanying text.

<sup>240</sup> See *supra* notes 109–10 and accompanying text.

<sup>241</sup> Cf. *supra* note 229.

<sup>242</sup> See MODEL RULES OF PROF’L CONDUCT R. 8.3(c) (2000), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 105; see also *supra* notes 218–25 and accompanying text.

<sup>243</sup> See *supra* notes 109–11 and accompanying text.

was most disturbed in *Himmel*—the non-reporting of an ethical violation in return for concessions in the substantive case.<sup>244</sup>

It can be argued that silence is appropriate<sup>245</sup> and, in fact, that strict enforcement of the duty to report in such circumstances would undercut the purpose and intent behind the safe harbor provision.<sup>246</sup> Both of these points may be true, but they fail to consider the potential for a large number of undeterred, abusive, repeat inhabitants of the “safe harbor.”<sup>247</sup> It is these repeat offenders, those with a pattern of abusing the adversary system, that the applicable Rules of Professional Conduct should be intended to ferret out and punish.<sup>248</sup> As emphasized in the comments to Model Rule 8.3, “[a]n apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover.”<sup>249</sup> The safe harbor provision, in essence, tacitly encourages lawyers to treat every potential violation of Model Rule 3.1 as an “isolated violation” that need not be reported. Although likely unintentional, this tacit encouragement to tolerate or ignore certain misbehavior within the litigation process<sup>250</sup> is inappropriate. To reverse this improper and silent acceptance of Model Rule 3.1 violations, the next section proposes a revision to the mechanics and scope of the duty to report in the context of litigation misconduct.<sup>251</sup>

#### IV. PROPOSAL TO SIMPLIFY AND REINVIGORATE THE DUTY TO REPORT

As discussed previously, the current duty to report is neither a model of clarity,<sup>252</sup> nor an effective tool of the bar’s “self-regulating” disciplinary

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<sup>244</sup> See *supra* note 197 and accompanying text.

<sup>245</sup> As noted previously, a recommendation has been made to establish a uniform federal rule that would ensure that no attorney who takes advantage of the safe harbor provision is ever reported for a violation of Model Rule 3.1. See *supra* notes 171–72 and accompanying text.

<sup>246</sup> See *infra* Part IV.B.

<sup>247</sup> See *supra* notes 112–13 and accompanying text.

<sup>248</sup> See *supra* note 159; see also Vairo, *Rule 11*, *supra* note 26, at 636 (noting that even courts are “more likely to take disciplinary action when the attorney is a repeat offender of Rule 11”).

<sup>249</sup> MODEL RULES OF PROF’L CONDUCT R. 8.3, cmt. 1 (2000), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 105; see also Richmond, *supra* note 6, at 195 (“Rarely are serious ethical violations isolated events. More often, the violation that the lawyer is contemplating reporting is part of a pattern of misconduct.”).

<sup>250</sup> As alluded to earlier in this article, the safe harbor provision of Rule 11 is but one example of the types of mechanisms within the adversary system that appear to sanction or promote acceptance of improper litigation conduct. See *supra* note 17.

<sup>251</sup> This article has focused on misconduct within the litigation process, and therefore, the proposal contained in *infra* Part IV is geared specifically towards the adversary system. Nevertheless, the suggested changes should be considered in the context of the duty to report generally.

<sup>252</sup> See *supra* notes 210–25 and accompanying text.

system.<sup>253</sup> Despite the importance of this duty to the attorney discipline process, it seems as though little serious consideration has been given to enlivening Model Rule 8.3(a) or making it more efficacious.<sup>254</sup>

To be effective, any alteration in the mechanics of the duty to report must accomplish two things: (1) it must make the act of reporting relatively routine and easy, and (2) it must target those who have a practice of flouting the ethical rules.<sup>255</sup> Both can be achieved through the establishment of computerized "litigation misconduct databases" within each jurisdiction. In addition, given the large number of lawyers who are admitted in more than one state,<sup>256</sup> a nationwide network should be established to allow jurisdictions to access and exchange information about attorneys. This network would eliminate the potential problem of misbehaving attorneys changing jurisdictions in an effort to avoid discipline.<sup>257</sup>

The creation of a nationwide network to track professional misconduct is not an entirely novel concept. The ABA already maintains the National Lawyer Regulatory Data Bank, a voluntary national computer network that ostensibly keeps track of lawyers throughout the country who have been disciplined by state authorities.<sup>258</sup> While certainly a well-intentioned gesture, this system has serious weaknesses that render it ineffective, particularly with regard to the "illegitimate advocacy" that is the subject of this article. First, the ABA's Data Bank only includes those who have actually been *disciplined*, thus, excluding lawyers who

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<sup>253</sup> See *supra* Part III.B and note 9.

<sup>254</sup> For a discussion of some proposed changes to Model Rule 8.3 that might improve upon the duty to report, see Lynch, *supra* note 6, at 539–45; Burwick, *supra* note 5, at 153–54.

<sup>255</sup> The current version of Model Rule 8.3(a) already sufficiently addresses and encourages the reporting of truly egregious ethical violations. See *supra* note 217 and accompanying text. As a result, there is no real need to alter this aspect of the rule.

<sup>256</sup> See, e.g., Frank J. Murray, *Practitioners Almost Bulletproof When it Comes to Client Complaints*, THE WASH. TIMES, July 20, 2000, at A14 (noting that there are tens of thousands of attorneys licensed in more than one state).

<sup>257</sup> Cf. ABA, CTR. FOR PROF. RESP., *LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT* 84 (1992) [hereinafter MCKAY REPORT] (observing that "[w]ithout a fast and thorough system for tracking lawyers who have been disciplined, a lawyer can avoid suspension or disbarment by moving to another jurisdiction"); Murray, *supra* note 256, at A14 (noting that there is no foolproof system to prevent disciplined lawyers from opening shop elsewhere).

<sup>258</sup> See MCKAY REPORT, *supra* note 257, Recommendation 20, at 84–85 (recommending improvements to the Data Bank to promote greater accessibility and efficiency). The medical profession maintains the National Practitioner Data Bank, which contains information on physicians and dentists regarding all medical malpractice payments and certain professional review actions. See National Practitioner Data Bank for Adverse Information on Physicians and Other Healthcare Practitioners, 45 C.F.R. § 60.7 (2000). The current version of the National Practitioner Data Bank is a bit more limited than what I believe is needed to address the litigation misconduct problem, but it does at least provide a model that can be looked to for guidance.

have been sanctioned by courts, but not disciplined.<sup>259</sup> The system proposed in this article would include such lawyers, as well as unsanctioned lawyers who have been reported for litigation misconduct, but not yet disciplined.<sup>260</sup> In the Rule 11 context, for example, the system would include those lawyers who have withdrawn or amended pleadings after being served with a Rule 11 motion.

In addition to under-inclusiveness with regard to scope, the ABA's Data Bank is also functionally under-inclusive in that jurisdictions participate on a strictly voluntary basis, and the information that is ultimately posted is not very specific.<sup>261</sup> The system proposed in this article would be mandatory with the primary reporting burden resting on individual attorneys themselves, rather than being subject to the bureaucracy of bar authorities. Notwithstanding the current deficiencies in the ABA's Data Bank, it may be possible to coordinate that existing system with the "litigation misconduct databases" proposed herein so as to facilitate the establishment of a nationwide network.<sup>262</sup>

The proposed change to the reporting system will necessitate an amendment to Model Rule 8.3 to emphasize and highlight the reporting requirement in the context of commonly overlooked litigation misconduct. Something along the lines of the following should be added, possibly as a subpart to Rule 8.3(a):

A lawyer's duty to inform under this rule is in no way altered or relieved by the failure of a court to impose sanctions for improper conduct or by the existence of other legal authority that may permit offending lawyers to avoid possible court-imposed sanctions by taking subsequent remedial action, including the withdrawal of a frivolous claim or contention.<sup>263</sup> The reporting

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<sup>259</sup> Various commentators have suggested that the ABA Data Bank should include the names of lawyers who have been sanctioned under Rule 11, but at present it still does not. *See* Nelken, *Sanctions*, *supra* note 43, at 1352 n.249 (noting the potential increased chilling effect of Rule 11 sanctions if the ABA included published Rule 11 sanctions decisions in its Data Bank, as was apparently being considered); Parness, *Disciplinary Referrals*, *supra* note 24, at 66 & n.158 (citing Professor John Leubsdorf's call for a "national [R]ule 11 registry" and the MCKAY REPORT's recommendations to improve the National Lawyer Regulatory Data Bank); *see also* Grosberg, *supra* note 26, at 662 & n.360 (suggesting "[t]he integration of disciplinary, malicious prosecution, malpractice, and Rule 11 information into a data bank with easy accessibility" as a way to maintain centralized data regarding "bad lawyering"); John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 129 (1995) (noting the potential benefit of a "national data base for lawyers' disciplinary records"). While these recommendations are noteworthy and appropriate, the current proposal goes a step farther insofar as it would include those lawyers who are guilty of litigation misconduct that is routinely overlooked or endured, and therefore results in neither discipline nor court sanction.

<sup>260</sup> *See infra* notes 268–76 and accompanying text; *see also supra* note 259.

<sup>261</sup> *See* Murray, *supra* note 256, at A14.

<sup>262</sup> *See id.* (discussing the push to explore "mandatory, computerized tracking" of disciplined attorneys).

<sup>263</sup> *Cf.* Parness, *Fines*, *supra* note 30, at 898 (suggesting the incorporation of a reporting rule into local federal rules that would "mandate (or at least encourage) those involved in civil

obligation in this context shall be fulfilled by informing the appropriate disciplinary authority of the name of the alleged offender, and supplying copies of relevant pleadings and/or motions served or filed that relate to the alleged litigation misconduct.

In addition, an explanatory comment should be included that reads as follows:

In any court proceeding, when a lawyer seeks sanctions or other relief for the litigation misconduct of another attorney, either orally or by filing or serving a motion or other paper, including but not limited to serving a draft motion under Federal Rule of Civil Procedure 11 or other similar state counterpart, the lawyer's obligation under Rule 8.3(a) to report the other attorney's misconduct will likewise be implicated.

Moreover, either the text of the rule or the comments thereto should also be revised to explain clearly the nature and operation of the "litigation misconduct database."<sup>264</sup>

How should this computerized reporting mechanism operate? Take, as an example, an offending lawyer who avoids Rule 11 sanctions by resort to the safe harbor provision:<sup>265</sup>

Lawyer P has asserted, on behalf of his client, various legally and factually insupportable claims against Lawyer D's client in federal district court. Upon receiving a copy of Lawyer P's complaint, Lawyer D contacts Lawyer P and says: "You've got to be kidding with this lawsuit." Lawyer P emphasizes that he is not kidding, and suggests that a quick settlement might be a good way to resolve this matter before incurring a lot of unnecessary legal fees and expenses. Given the apparent frivolity of Lawyer P's claims, Lawyer D, after consulting her client of course, decides that a Rule 11 motion is in order. Accordingly, Lawyer D and her associate research and prepare a detailed motion and supporting memorandum of law, accompanied by affidavits of key witnesses, clearly setting forth the utterly meritless nature of Lawyer P's claims. On the twentieth day following the service of these papers, Lawyer P voluntarily dismisses all claims, without prejudice.<sup>266</sup>

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litigation to report their beliefs about significant Rule 11 attorney misconduct which will not otherwise likely be subject to any court initiative or motion"). *But see supra* note 111.

<sup>264</sup> Furthermore, states that currently have non-mandatory reporting obligations (i.e., "should report," rather than "shall report"), should amend their respective "duties to report" and make them mandatory. *See supra* note 5.

<sup>265</sup> The example uses the scenario of a plaintiff filing a frivolous complaint, but a defendant asserting a baseless defense would be an equally appropriate illustration.

<sup>266</sup> To come within the requirements of Federal Rule of Civil Procedure 41(a), assume that Lawyer D has not yet filed her answer pursuant to the granting of several time extensions. As a result, Lawyer P was able to dismiss the lawsuit unilaterally without prejudice. *See* FED. R. CIV.

Under the present system of reporting and its accompanying attorney mindset, Lawyer P's voluntary dismissal would likely be the end of the story,<sup>267</sup> no matter how many times he may have previously acted in the precise same manner. The proposed computerized reporting system would eliminate this potential for unaddressed repeat abuse.

First, it is important to note that under the proposed amendment to Model Rule 8.3, the duty to report would automatically be triggered at the time that Lawyer D served her Rule 11 papers on Lawyer P.<sup>268</sup> This is wholly consistent with the "knowledge" requirement of Model Rule 8.3(a) because it is apparent that upon serving the motion and related papers, Lawyer D possessed the requisite awareness of a Model Rule 3.1 violation, among others, to activate her reporting obligation.<sup>269</sup> Hence, under the proposed system, at this point, rather than filing a written complaint or grievance with the appropriate disciplinary body, Lawyer D would report Lawyer P's name to the disciplinary body and submit copies of: (1) the alleged offending pleading or paper (here, the complaint) and (2) the Rule 11 motion that was served. Lawyer P's name would then be entered into the jurisdiction's "litigation misconduct database" as the "Alleged Offender" (or some similar designation), with a brief description of the nature of the alleged offense (i.e., "Rule 11 violation"). Lawyer D's name would also be entered as the "Reporter."<sup>270</sup> Because the reporting obligation is automatic, there is no need to

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P. 41(a). Thus, the court has not and will not have an opportunity to learn of Lawyer P's conduct.

<sup>267</sup> See *supra* notes 109–11 and accompanying text.

<sup>268</sup> See *supra* notes 132–53 and accompanying text, and *supra* text accompanying notes 234–39; see also notes 263–64 and accompanying text.

<sup>269</sup> See *supra* notes 132–53 and accompanying text; *supra* text accompanying notes 234–39; see also notes 263–64 and accompanying text. It is certainly true that Lawyer D might possess the requisite "knowledge" of a violation of Model Rule 3.1 by Lawyer P, even if Lawyer D opted not to serve a Rule 11 motion. Under such circumstances, Lawyer D should still have an obligation to report Lawyer P to the appropriate disciplinary body, but the fact that she may not is less troubling than her failure to report following actual service of a Rule 11 motion. As alluded to previously, in this latter scenario, a situation is created whereby Lawyer D would essentially be agreeing not to report Lawyer P in exchange for dismissal of Lawyer P's claims. See *supra* text accompanying note 234; see also *supra* note 186 and accompanying text. Such *quid pro quo* bargaining with the duty to report is highly inappropriate. See *supra* note 186.

<sup>270</sup> In addition, it would also seem appropriate to maintain a record of the name of the firm (if any) for which both the "Alleged Offender" and the "Reporter" work, so as to guard against the potential for systematized litigation misconduct and/or over-reporting by a firm. For a discussion of how the concern regarding possible over-reporting should be addressed, see *infra* Part IV.A. See also *infra* note 282 (discussing the possible need to consider subjecting law firms to discipline in this context).



notify Lawyer P that he has been reported—he should already know or at least expect as much.<sup>271</sup>

If Lawyer P's name does not appear again in the database as an "Alleged Offender" for a period of four years, his name will automatically be deleted from the system, as will the information contained in his file, and the disciplinary authorities will never investigate this particular misconduct. Though improper, his one isolated lapse is not really the sort of misconduct that should occupy the scarce resources of disciplinary bodies.<sup>272</sup> In addition, the fact that his name does not appear subsequently also suggests that having his name reported deterred him from committing further similar abuses.

On the other hand, if Lawyer P's name appears in excess of three times as an "Alleged Offender" within a four-year period, then an investigation will be triggered by the appearance of a red flag next to his name in the database or by some other prompting mechanism. As an alleged repeat abuser of the system, Lawyer P is, at this point, deserving of the attention of the disciplinary authorities.<sup>273</sup>

What happens if Lawyer P's name appears in the database in excess of three times over a four-year period for alleged Rule 11 violations, but with regard to two of those alleged violations, Lawyer P actually resisted the motions in court and prevailed? Obviously, it may not be appropriate to subject Lawyer P to an investigation under these circumstances. To avoid this possibility, it should be incumbent upon the "Reporter" of an alleged Rule 11 violation to promptly notify the disciplinary authorities in the event that the Rule 11 motion is ultimately

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<sup>271</sup> This of course raises the issue of what should happen if Lawyer D fails in her obligation to report Lawyer P to the litigation misconduct database. Does Lawyer P then have an obligation to report Lawyer D for failing to make the required report? If the answer is "yes," the obvious problem is that Lawyer P would then, in effect, be reporting himself, as well—an obligation that a lawyer most certainly does not have under Model Rule 8.3(a). See ROTUNDA, LEGAL ETHICS *supra* note 3, § 54-1.4.2. The proposed system is intended and designed to eliminate the evils and disincentives associated with reporting by making the informing obligation relatively automatic and more straightforward and by placing more emphasis on the duty to report itself. If the system is properly emphasized and implemented, the "non-reporting" problem will hopefully be very minimal. Having said that, if Lawyer D fails to report Lawyer P following service of the Rule 11 motion, and the disciplinary authorities are informed of that fact, Lawyer D should definitely be subject to discipline under Model Rule 8.3. See *supra* note 269.

<sup>272</sup> As noted previously, "repeat offenders" are and should be the primary focus of disciplinary authorities. See *supra* note 159.

<sup>273</sup> See *supra* note 159; cf. Kramer, *supra* note 26, at 809 (noting that regular reporting by federal district court clerks of all Rule 11 sanctions to state disciplinary authorities would disclose the imposition of multiple sanctions against the same lawyer and that these repeat offenders should be investigated). It should also be noted that to the extent that any single act by an attorney is deemed particularly egregious, it may be more appropriate for a grievance to be filed directly with the proper disciplinary authority, rather than simply reporting the alleged offender's name for entry into the database. However, at a minimum, the latter must be done.

denied or otherwise resolved favorably towards the attorney reported. Any such additional information should be added to and maintained in the database.

The proposed system is intended to focus needed attention and limited resources on those who are truly abusing the adversary system and flouting their ethical obligations therein, without fear of reprisal.<sup>274</sup> The system will also reduce the disincentive to report by making the procedure relatively automatic and straightforward. Under revised Model Rule 8.3(a),<sup>275</sup> a lawyer who serves a Rule 11 motion has no choice but to report the motion's recipient, and therefore, the potential tattletale stigma will not be as strong.<sup>276</sup> Further, the reporting obligation ideally could be satisfied through a simple e-mail message with the relevant documents attached.

Consideration must also be given to the level of confidentiality, if any, that is appropriate for the contents of the "litigation misconduct database." Because the goal of the proposed reporting system is to reinvigorate Rule 11 by promoting its primary goal of deterrence, complete public accountability would seem most appropriate.<sup>277</sup> Specifically, if the information contained in the database is publicly accessible in some fashion, it will certainly impact attorney behavior—conduct that presently goes virtually unnoticed would be available for review by any interested party, which should serve as a strong deterrent.<sup>278</sup>

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<sup>274</sup> See *supra* note 159; see also *supra* note 113.

<sup>275</sup> See *supra* text accompanying notes 263–64 (setting forth the text of the proposed revisions to the rule and its comments).

<sup>276</sup> See also *supra* note 271; cf. Rotunda, *supra* note 8, at 992 (observing that a mandatory reporting rule "serves to reduce the internal debate between one's desire to weed out the corrupt element from the bar and the concern that one must not snitch, squeal, or tattle on a colleague").

<sup>277</sup> At present, most states allow for varying degrees of public access to disciplinary files, but only Oregon appears to have a completely open system, permitting access as soon as a request for investigation is filed. See Lawrence H. Averill, Jr., *The Revised Lawyer Discipline Process in Arkansas: A Primer and Analysis*, 21 U. ARK. LITTLE ROCK L. REV. 13, 40 (1998); Betty Weinberg Ellerin, *Open Disciplinary Hearings*, 69 N.Y. ST. B.J. 46 (1997); Kristina Serafini Pennex, Note, *Lifting the Veil of Secrecy by Opening Michigan's Disciplinary System*, 73 U. DET. MERCY L. REV. 569, 578–79 (1996). The ABA Model Rules for Lawyer Disciplinary Enforcement allow for public access following "a determination that probable cause exists to believe that misconduct occurred and after the filing and service of formal charges, unless the complainant or respondent obtains a protective order." ABA CENTER FOR PROF'L RESPONSIBILITY, MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 16(A) (1996).

<sup>278</sup> Cf. Leubsdorf, *supra* note 259, at 129 (noting that a "national data base for lawyers' disciplinary records could help the public to select ethical counsel and discourage unethical conduct by lawyers"). Such public accessibility, however, will no doubt raise concerns regarding, among other things, the privacy rights of lawyers. In other words, if attorneys are improperly reported, or reported only once or twice, a damaging and unwarranted stigma will attach. This concern is not well-founded. First, the so-called "stigma" would be no worse than the "stigma" to which any citizen wrongly accused or sued is subject within our criminal and civil justice systems. Second, the mechanics of the proposed system should adequately address such concerns, in any event. See *supra* notes 268–76 and accompanying text.

As with any proposal for change, the new reporting system will likely raise some potential concerns, the two most significant of which appear to be that: (1) lawyers will over-report, in a willful effort to use the informing obligation as a “chilling” litigation weapon similar to the 1983 version of Rule 11,<sup>279</sup> and (2) the “litigation misconduct database” will undermine the purpose of the safe harbor provision of Rule 11 because lawyers will no longer have as strong of an incentive to withdraw meritless positions. Although understandable, the actual operation of the proposed system demonstrates that such concerns are misplaced.

### A. *Danger of Over-Reporting*

A legitimate concern regarding the proposed “litigation misconduct database,” at least in the context of Rule 11, is that lawyers will use the reporting requirement as another “Rambo” litigation tactic<sup>280</sup> designed to pound the adversary into submission. There are no doubt lawyers who may over-report, but the structure of the process as well as some general professional dynamics should minimize the likelihood of this happening.

First, under the proposed system, the reporting lawyer’s name is also entered into the database as the “Reporter.” Unlike with the “Alleged Offender,” a permanent record of the number of times that a lawyer reports others should be maintained. Hence, the number of times that any given lawyer reports can easily be checked and, if excessive, could be raised as an issue in connection with any disciplinary investigation. For example, assume that Lawyer D had reported ten attorneys prior to reporting Lawyer P and that Lawyer D’s report triggers an investigation of Lawyer P. There will at least be some circumstantial evidence to undercut the credibility of Lawyer D’s reporting of Lawyer P.<sup>281</sup> In addition, there should be a reporting threshold that, when crossed, would result in an investigation of the habitual “reporter” for possible disciplinary action<sup>282</sup> for

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Another potential concern is that an open system will encourage lawyers to over-report in a malevolent attempt to disparage an adversary. That is, of course, a possibility, but again the system will have safeguards that should limit such abuse. *See infra* Part IV.A.

<sup>279</sup> *See supra* note 39 and accompanying text.

<sup>280</sup> *See generally* Kanner, *supra* note 10.

<sup>281</sup> Furthermore, a permanent record of the reporting lawyer’s firm, if any, should also be maintained for this purpose. *See supra* note 270. In addition, as mentioned previously, a record will be maintained with regard to whether or not a Rule 11 motion is denied or otherwise resolved in favor of the non-movant. *See supra* text 1609. Such information could likewise be raised by an “Alleged Offender” in his or her defense.

<sup>282</sup> As with the “Alleged Offender,” it seems that an investigation of a “Reporter” should be triggered by a certain number of reports made within a specified time period—possibly eight within a span of three years. Although discipline of law firms is not presently a possibility under the Model Rules, it is something that should be considered, at least in this context. For a thorough and thoughtful discussion of the concept of law firm discipline, see generally Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991); *cf.* FED. R. CIV. P. 11(c) (permitting sanctions against law firms for violations of Rule 11). *But see*

engaging in conduct designed to embarrass or burden third parties,<sup>283</sup> or otherwise prejudice the administration of justice.<sup>284</sup> The fact that a lawyer's reporting record will not go unnoticed and could actually result in discipline should greatly reduce the likelihood of over-reporting.<sup>285</sup>

More fundamentally, as noted previously, there is a well-known tradition of reluctance within the bar to report colleagues.<sup>286</sup> Although the proposed reporting system will address many of the issues that contribute to the lack of reporting,<sup>287</sup> it realistically will not do much to eliminate the innate aversion to "squealing." To a certain extent, this is a good thing because it increases the probability that only those lawyers truly deserving of discipline will be reported. This in turn will have a desirable effect on the use, or abuse, of Rule 11 as a litigation weapon.<sup>288</sup> Specifically, if Lawyer D is considering pursuing a Rule 11 motion against Lawyer P, Lawyer D knows that if she does so, she will also have to report Lawyer P's name to the "litigation misconduct database." Lawyer D may be willing to prepare and serve a Rule 11 motion, even if not well-founded, in the absence of an automatic reporting requirement. With this requirement firmly in place, however, Lawyer D is much more likely to think long and hard about the appropriateness of a Rule 11 motion. Thus, the new system will have the additional benefit of weeding out improper use of Rule 11.<sup>289</sup>

### *B. Undermining of the Safe Harbor Provision*

Under the proposed reporting system, at the time that an attorney serves a Rule 11 motion on opposing counsel, he or she must also simultaneously report the alleged offending lawyer to the "litigation misconduct database."<sup>290</sup> The obvious question that arises at this point is: If the lawyer is going to be reported to the database, doesn't that undercut the purpose of the safe harbor provision? In other words, under the revised system, is there any real benefit to taking refuge in the safe harbor? Furthermore, won't the knowledge that a lawyer will potentially

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CURRENT REPORTS No. 12, *supra* note 146, at 349 (noting that the Ethics 2000 Commission has withdrawn its proposals to subject law firms to discipline for ethical violations).

<sup>283</sup> See MODEL RULES OF PROF'L CONDUCT R. 4.4 (2000), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 79.

<sup>284</sup> See *id.*; see also *id.* R. 8.4(d), reprinted in MORGAN & ROTUNDA, *supra* note 1, at 106.

<sup>285</sup> See *supra* notes 277-78 and accompanying text.

<sup>286</sup> See *supra* note 9, Part III.A-B.

<sup>287</sup> See *supra* note 9, Part III.B.

<sup>288</sup> For discussion of prior use of Rule 11 as a "litigation weapon," see *supra* note 39 and accompanying text. See also *supra* note 89.

<sup>289</sup> As discussed earlier, one of the main purposes of amending Rule 11 in 1993 was to reduce the number of motions filed. See *supra* notes 84 and 103 and accompanying text. Thus, the proposed changes to the reporting system will actually assist Rule 11 in achieving this important goal.

<sup>290</sup> See *supra* text accompanying notes 268-71.

have his or her name reported to the authorities serve to chill creative advocacy in a fashion similar to the 1983 version of Rule 11?<sup>291</sup>

Though understandable, these concerns should not be significant. First, it is important to emphasize again that the primary purpose of Rule 11 is not compensation, but *deterrence* of frivolous filings.<sup>292</sup> The goal of the rule is not to punish violators, but rather to prevent or at least discourage, violations in the first place.<sup>293</sup> The proposed reporting system complements Rule 11 in achieving this desired aim.<sup>294</sup> Lawyers will be fully aware of the potential ramifications of pursuing claims or defenses that are lacking in legal or factual merit (i.e., being reported) and will no longer take complete comfort in knowing that the safe harbor provision can rescue them in a pinch. Recall that lawyers who routinely seek the sanctuary of the safe harbor provision are typically careless, incompetent or ill-intentioned.<sup>295</sup> It is desirable to encourage these lawyers to reflect more conscientiously on their claims, defenses, or other legal positions before asserting them. The proposed system will have that effect.

Notwithstanding the foregoing, the safe harbor provision is still a valuable component of Rule 11. First, under the proposed system, a lawyer will not be investigated unless and until his or her name has been reported in excess of three times within four years.<sup>296</sup> Although most lawyers likely do not want their names reported, even if no disciplinary investigation is forthcoming, the fact that any such investigation is not imminent under the new reporting system prevents the safe harbor provision from being completely undermined. This is particularly important for lawyers who make innocent mistakes.<sup>297</sup> One of the main reasons for delaying any investigation until after the third report is to avoid unnecessarily going after attorneys who are not “worthy” of discipline. The focus is, and should be, on repeat offenders. Moreover, in the end, the desire to avoid Rule 11 sanctions alone should continue to provide ample incentive for lawyers to take refuge under the safe harbor provision when warranted.

One final point that deserves mention is that various amendments to Rule 11, besides the safe harbor provision, ensure that lawyers, as well as litigants, will not be unduly dissuaded from asserting novel or creative legal claims.<sup>298</sup> Thus, Rule 11 should not even be implicated in situations where an attorney is making a “nonfrivolous argument for the extension, modification, or reversal of existing

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<sup>291</sup> See *supra* note 44 and accompanying text.

<sup>292</sup> See *supra* notes 66–67, 70–71 and accompanying text.

<sup>293</sup> *Id.*

<sup>294</sup> See Ripps & Drowatzky, *supra* note 26, at 88–89 (noting that survey results indicated a belief amongst the bar that reporting of at least substantial Rule 11 violations to disciplinary authorities “would deter the filing of frivolous suits”).

<sup>295</sup> See *supra* text accompanying notes 101–02.

<sup>296</sup> See *supra* text accompanying notes 272–73.

<sup>297</sup> See *supra* note 102.

<sup>298</sup> See *supra* notes 93–100 and accompanying text.

law or the establishment of new law”;<sup>299</sup> nor where the lawyer represents that allegations initially lacking in evidentiary support, are likely to have such support “after a reasonable opportunity for further investigation or discovery.”<sup>300</sup>

## V. CONCLUSION

The adversarial component of the litigation process is the cornerstone of the American justice system.<sup>301</sup> Ideally, if two equally matched attorneys zealously and competently represent their clients within the bounds of the ethical rules and the law, the correct result will ultimately be reached.<sup>302</sup> This ideal, however, is frequently not achieved because, for one thing, many attorneys do not represent their clients in a fashion consistent with their professional obligations. To make matters worse, lawyers, judges, and the adversary system itself are accepting or tolerant of such illegitimate advocacy. Even more troubling, this mindset is at times, officially sanctioned or reinforced by the very rules or procedures designed to ensure the legitimacy and credibility of the process.

This article has focused on the example of Rule 11, which perpetuates a form of advocacy that no lawyer believes to be legitimate—the filing and maintenance of frivolous claims, defenses, or other contentions. The focus could have just as easily been on the accepted use of peremptory challenges in a discriminatory fashion<sup>303</sup> or the acceptance of discovery abuse as a part of the “litigation game.”<sup>304</sup> The fact of the matter is that there is a host of litigation misconduct that either slips through the cracks of both the procedural and disciplinary rules, or else is simply ignored. The key is to establish a prophylactic device that will serve in the long run to discourage lawyers from engaging in such misconduct in the

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<sup>299</sup> FED. R. CIV. P. 11(b)(2).

<sup>300</sup> *Id.* at R.11(b)(3).

<sup>301</sup> See FREEDMAN, *supra* note 1, at 13; WOLFRAM, *supra* note 1, § 10.1, at 564.

<sup>302</sup> See WOLFRAM, *supra* note 1, § 10.1, at 565–65.

<sup>303</sup> With regard to discriminatory use of peremptory challenges in jury selection, the comments to Model Rule 8.4 actually discourage the imposition of discipline for such misconduct. Specifically, the comments provide that:

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

MODEL RULES OF PROF’L CONDUCT R. 8.4, cmt. 2 (2000), *reprinted in* MORGAN & ROTUNDA, *supra* note 1, at 107.

<sup>304</sup> See, e.g., Maute, *supra* note 12, at 52 (noting the tolerance of general discovery abuse by observing that “[m]any lawyers regarded discovery as a game, with tactical delay, harassment, and evasion part of the unwritten rules”).

first instance. After all, the primary goal of Rule 11 itself is to *deter*, not to punish.<sup>305</sup>

As this article has proposed, one approach to this problem would be to reinvigorate the ethical obligation to report the misconduct of other attorneys. The acts of litigation misconduct that are routinely tolerated or ignored constitute violations that should be reported to the appropriate disciplinary authorities under Model Rule 8.3. Because they typically are not, the potential exists for habitual, illegitimate advocates to persist in their patterns of abuse. In order to eliminate this, attorneys must recognize and understand that this sort of behavior, if and when it occurs, will not go unnoticed and will indeed be dealt with in a serious manner. The implementation of “litigation misconduct databases” throughout the discipline system would be an effective way to convey this critical message to all members of the legal profession.

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<sup>305</sup> See *supra* notes 66–67, 70–71 and accompanying text.

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